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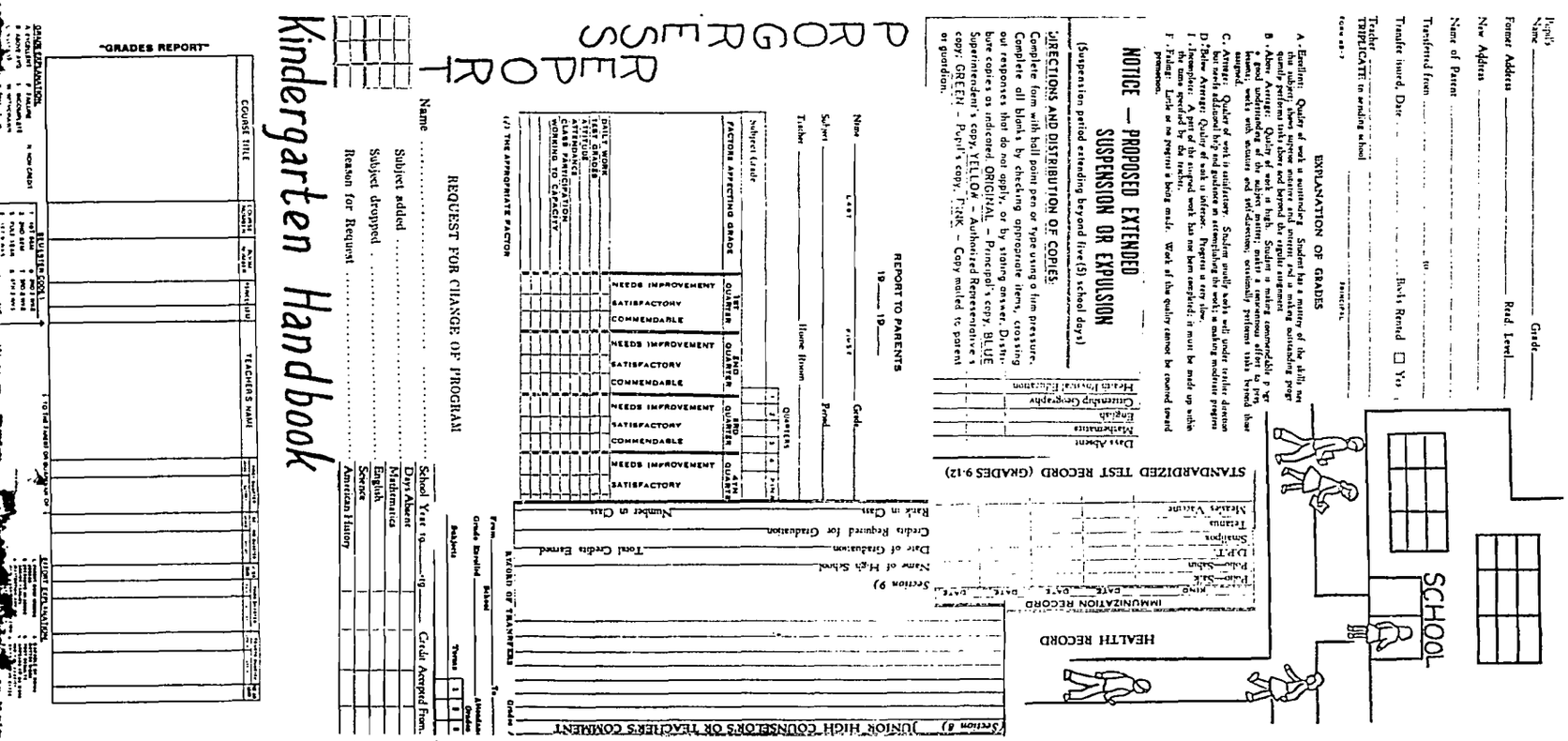
ABSTRACT

In this monograph, the authors explore and enlighten the area of student records by researching the history, analyzing the case law, and interpreting the statutes in this sensitive field. The authors discuss the conflict between the student's right to privacy and the public's right to know and suggest a workable solution. After reviewing the history of the right to privacy, the authors analyze constitutional and statutory provisions, legal cases, and State board of education rules to determine the legal principles that govern the inspection, copying, and expunging of student records. In the appendixes, the authors have provided (1) a graphic presentation that compares State and Federal constitutions insofar as those documents apply to the individual's privacy, (2) an up-to-date statutory bibliography of State statutes, and (3) a tabular summary of State department of education rules concerning student records. (Author/JF)

Legal Aspects of Student Records

No. 5 in the NOLPE MONOGRAPH SERIES

Henry E. Butler, Jr.
K. D. Moran
Floyd A. Vanderpool, Jr.



Legal Aspects of Student Records

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DISCLAIMER

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ERIC/CEM State-of-the-Knowledge Series, Number Twelve
NOLPE MONOGRAPH SERIES, Number Five

FOREWORD

This monograph by Henry E. Butler, Jr., K. D. Moran, and Floyd A. Vanderpool, Jr. is one of a series of state-of-the-knowledge papers dealing with the general topic of student control and student rights in the public schools. The papers were prepared through a cooperative arrangement between the ERIC Clearinghouse on Educational Management and the National Organization on Legal Problems of Education (NOLPE). Under this arrangement, the Clearinghouse provided the guidelines for the organization of the papers, commissioned the authors, and edited the papers for content and style. NOLPE selected the topics and authors for the papers and is publishing them as part of a monograph series.

The authors discuss the legal problems associated with the collection and use of information about students by public elementary and secondary schools. After reviewing the history of the right to privacy, they analyze constitutional and statutory provisions, legal cases, and state board of education rules to determine the legal principles that govern the inspection, copying, and expunging of student records.

Dr. Butler, a professor of educational administration at the University of Arizona, has been head of the university's Department of Educational Administration since 1969. He received his bachelor's degree with honors in 1938 from Yale College, his law degree in 1941 from Yale Law School, and his doctor's degree in 1960 from the University of California at Berkley.

Dr. Moran is the editor of NOLPE NOTES and the assistant executive director of the Kansas Association of School Boards. He has been a visiting professor of school law at the University of Kansas and other Kansas colleges. He has also served as a classroom teacher, principal, and school superintendent. He holds two bachelor's degrees from the University of Kansas (1954 and 1956), a master's degree from Kansas State University (1960), and a doctor's degree from the University of Kansas (1967).

Dr. Vanderpool is principal of an elementary school in Denver, Colorado. He received his bachelor's degree in 1952, his master's degree in 1958, and his doctor's degree in 1970, all from the University of Denver. The title of his doctoral dissertation is *Confidentiality of Pupil Personnel Records in the Public Schools of the United States.*

PHILIP K. PIELE, Director
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MARION A. MCGHEHEY,
Executive Secretary
NOLPE

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The membership of NOLPE represents a wide variety of viewpoints—school board attorneys, professors of educational administration, professors of law, state officials, local school administrators, executives and legal counsel for education-related organizations.

Other publications of NOLPE include the NOLPE SCHOOL LAW REPORTER, NOLPE NOTES, NOLPE SCHOOL LAW JOURNAL, YEARBOOK OF SCHOOL LAW, and the ANNUAL CONVENTION REPORT.

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THE FIRST SERIES OF FIVE PAPERS ON STUDENT CONTROL AND STUDENT RIGHTS ARE COMPLETE

They include:

1. *Legal Aspects of Control of Student Activities by Public School Authorities,* by E. Edmund Reutter, Jr., professor of education, Columbia University;

2. *Rights and Freedoms of Public School Students: Directions from the 1960s,* by Dale Gaddy, director, Microform Project, American Association of Junior Colleges, Washington, D.C.;

3. *Suspension and Expulsion of Public School Students,* by Robert E. Phay, associate professor of public law and government, University of North Carolina;

4. *Legal Aspects of Crime Investigation in the Public Schools,* by William G. Buss, professor of law, University of Iowa; and

5. *Legal Aspects of Student Records,* by Henry E. Butler, Jr., professor of educational administration, University of Arizona; K. D. Moran, assistant executive director of Kansas Association of School Boards, Topeka, Kansas; Floyd A. Vanderpool, Jr., principal, Stober Elementary School, Lakewood, Colorado.

I. INTRODUCTION

Permanent student records have been kept in the United States since 1838, when Horace Mann introduced the school register in Massachusetts. The school register recorded the names of students and the date they enrolled, withdrew, and were promoted; it also reported disciplinary actions. About the same time in Connecticut, Henry Barnard developed a similar register.[1] Soon attendance records became an "index of school efficiency."[2]

The scientific movement in education led to the need for better survey techniques, tests, and measurements, making records based only on attendance inadequate.[3] In 1909, Charles M. Lamprey, director of the Boston Model School, published the first individual student record, which was adopted by the Boston school system in 1910.

In 1912, the National Education Association (NEA) appointed a Committee on Records and Reports. The committee was of much value in standardizing the terms used in, and the procedures for, compilation of pupil records, but its main emphasis remained on records of attendance.[4]

In 1925 another NEA committee recommended the use of the following types of pupil records: teacher's daily register book, pupil's general cumulative record, pupil's health and physical records, guidance record, pupil's psychological clinic record, and principal's office record.[5] This report had far-reaching influence on the keeping of records. The strongest influence was the proposal for the implementation of a cumulative record for each child. In 1928 the American Council on Education made available the first cumulative record folder, and in 1942 the publication of *Appraising and Recording Student Progress* by Smith and Tyler initiated the cumulative record system on the comprehensive basis that we know it today.[6] This cumulative record has become the repository of all the accumulated information concerning a child and his family.

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[1] W. Yeager, Administration and the Pupil 329 (1949).
[2] A. Moehlman, *Child Accounting*, Journal of Educational Research (April, May, June 1924).
[3] Yeager, Administration, 329.
[4] *Id.* at 330.
[5] *Id.* at 100.
[6] A. Traxler & R. North, Techniques of Guidance (1966).

It is apparent that educational records of individual students have become increasingly personal in nature. Today's student records commonly contain the results of personality tests, psychological screenings, and evaluations by professional persons, in addition to scholastic data. As the information on record has become more personal, the demands for access to this information by individuals and agencies have increased.[7]

There are many reasons why people wish to see student records. School personnel, such as guidance counselors, social workers, and speech therapists, find need to review the records. Prospective employers, government agencies, and other schools and colleges believe that they, too, have the right to examine school records. At times pupil records are also needed for legal reasons.

The question of releasing or not releasing pupil information has become a running debate among school personnel. Some persons argue that parents or guardians should be given all the information concerning their children with test scores being interpreted by specialists.[8] Others argue that this should not be done, because even specialists cannot accurately determine all facets of the children's intelligence.[9] School personnel are often reluctant to release student records to parents. Teachers and administrators alike realize that not all I.Q., personality, achievement, and interest tests are accurate or valid.[10]

A question is raised because a person's name and information about himself are considered private, yet school records are considered public. Where is the line to be drawn between the student's right of privacy and others' right to know? Children operate under "proxy consent" because they are considered incapable of acting for themselves. Someone who occupies a position of responsibility for children acts for them under "proxy consent." Children are thus placed in double jeopardy. They are unable to make decisions for themselves and have no control over the release of information concerning themselves.[11] The American Council on Education has stated that educational institutions have an obligation to protect their pupils from unwarranted intrusion into their lives.[12]

[7]M. Ware, Law of Guidance and Counseling 39 (1964).
[8]R. Topp, *Let's Tell Parents Their Children's I. Q.'s*, 40 Phi Delta Kappan 343-346 (June 1959).
[9]J. Wilson, *Let's Not Tell Parents Their Children's I. Q.'s*, 40 Phi Delta Kappan 343-346 (June 1959).
[10]Ware, Law of Guidance, 38.
[11]Wilson, *Let's Not Tell Parents*, 343.
[12]American Council on Education, *Statement on Confidentiality of Student Records*, 95 School and Society 505 (9 December 1967).

Many educational authorities have recognized the need to clarify policies concerning release of information in student records. For example, in an editorial *The American School Board Journal* stated:

> Clarification is needed on procedures for selecting, transmitting, and protecting the types of confidential information regularly requested by employers, college admissions officers, and others with legitimate interests in the records of particular students.[13]

A recent report of a conference on the ethical and legal aspects of school record keeping points out that:

> Virtually all school systems now maintain extensive pupil records containing, in addition to a pupil's attendance and achievement record, standardized test scores, personality data, information on family background and current status, health data, teacher and counselor observation, anecdotal records, and so on. Despite this fact, very few systems have clearly defined and systematically implemented policies regarding uses of information about pupils, the conditions under which such information is collected, and who may have access to it. We do know, however, that important decisions affecting individual pupils are made, at least in part, on the basis of these school records.[14]

Introducing an element of urgency into the issue of student record management are recent technological advancements, the most important of which have been the development of standardized tests and the perfecting of the computer. Standardized tests provide a vast amount of personal data, which the computer makes instantly available. Government agencies, including the schools, have found it efficient and economical to combine their resources and develop cooperative centralized data centers.[15] The advent of such data collection centers is a source of alarm to many groups, who fear that the accumulation of vast reservoirs of personal and confidential data combined with the ease of instant retrieval will lead to misuse of the data collected.[16] Paul Baran of The Rand Corporation, in testimony before the House Special Subcommittee Hearings on *The Computer and Invasion of Privacy,* stated:

> . . . automated information files have the same properties as communications and transportation that cause the integrated networks to be self-agglomerating. It is cheaper to share the information by tying together inde-

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13*Should Student Records Be Made Available to Parents?*, 143 American School Board Journal 15 (December 1961).

14Russell Sage Foundation, Guidelines for the Collection, Maintenance and Dissemination of Pupil Records (Report of a Conference on the Ethical and Legal Aspects of School Record Keeping, Sterling Forest, N.Y.), (1970).

15D. Goslin & N. Bordier, *Record Keeping in Elementary Schools*, in On Record: Files and Dossiers in American Life (S. Wheeler ed.) 32 (1970).

16M. Brenton, The Privacy Invaders 17 (1964).

pendent systems than by building very large numbers of highly duplicating systems without interconnection. But "information" can be too treacherous a commodity to be widely disseminated with ineffectual controls. *Even a little information improperly used can do irrevocable harm.* Information is readily counterfeited. It can be quickly reproduced and widely transmitted very cheaply. (emphasis added)

Today we can see the independent, privated automated information systems being interconnected to form larger growing systems. The direction of growth is clear.[17]

Judge Brandeis wrote, "The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well-meaning, but without understanding."[18] Engberg, in applying this statement to the use of computerized personnel data in invading individual privacy, implied that such men of zeal abound in government, science, education, and corporate business life: "They are sucking the privacy out of our lives in the name of national security, science, progress, and other almost unassailable causes."[19]

Inconsistencies among laws and regulations compound the problem. Laws governing access to public records vary greatly from state to state. As a consequence of this lack of uniformity, public school administrators have little to guide them in managing student records. Cross, referring to access to public records, stated, "Viewed overall from a nationwide . . . standpoint, the welter of varying statutes, conflicting court decisions and wordy departmental regulations present the problem as a veritable Chinese puzzle."[20]

Absence of specific reference to school districts in the "open records" statutes of many states leaves the application of such statutes to school records in the hands of the courts. In the absence of statutes, the courts must rely on precedents of common law.[21]

A review of the educational literature for the past ten years suggests that relatively little serious research has been concentrated on the legal aspects of student records.

Ware's book, *Law of Guidance and Counseling*,[22] provides a background discussion of the accessibility of student records to the

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17U. S., Congress, House, Committee on Government Operations, Subcommittee; The Computer and Invasion of Privacy, Hearing, 89th Cong., 2nd Sess., July 26, 27, and 28, 121-122 (1966).

18E. Engberg, The Spy in the Corporate Structure 72 (1967).

19*Id.*

20H. Cross, The People's Right To Know 4 (1953).

21Ware, Law of Guidance, 43.

22Ware, Law of Guidance.

public. Ware deals almost exclusively with court cases and does not attempt to examine the statutory provisions of the various states.

A conference report, *Guidelines for the Collection, Maintenance and Dissemination of Pupil Records*, by the Russell Sage Foundation, provides suggestions for managing student records.[23] Lister's background paper for this conference, *Confidentiality of Pupils' School Records*, contains valuable information on the legal aspects of the confidentiality of student records.[24]

Other sources useful in obtaining information concerning student records are publications of the American Personnel and Guidance Association and the American Association of School Personnel Administrators. Law journals are most valuable, as are articles that appear in the various educational journals.

This paper deals primarily with the legal problems associated with the institutionalized collection and use of information about students by the public elementary and secondary schools of the United States. In particular it concerns the circumstances under which information contained in student records must be released, and the legal principles that apply to the voluntary release of information contained in student records.

Chapter 2 reviews the historical development of the right to privacy. Chapter 3 examines the constitutional and statutory provisions that regulate the right of individual privacy and access to both public records and student records. Chapter 4 reviews the principles of common law pertinent to the management of public records and student records. Chapter 5 surveys state board of education rules pertaining to student records. The final chapter draws conclusions and makes recommendations for the management of student records.

Definitions

For the purposes of this paper, the following terms are defined:

Legal status. Legal status consists of those principles of law that regulate or govern the right of individual privacy and the right of the people to know.[25]

Right to privacy. The right to privacy is the legally protected

[23]Russell Sage Foundation, Guidelines.

[24]C. Lister, The Confidentiality of Pupils' School Records: A Background Paper for the Working Conference to Consider Certain Legal Aspects of the School Counselor Role (1969).

[25]H. Black, Black's Law Dictionary 1038 (4th ed. 1968).

right of an individual "to be free from unwarranted publicity" and "to be protected from any wrongful intrusion into his private life which would outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities."[26]

Right to know. The right to know is the right to become maximally informed. In this paper, the right to know is the right to inspect public records or student records.

Public record. "A public record is a written memorial, made by a public officer. It is required by law to be kept, or is necessary to be kept in the discharge of a duty imposed by law."[27]

Quasi-public record. A quasi-public record is a record that is as if, or almost as if, a public record.[28]

Student record. A student record is one kept by the schools in accordance with a state law or a local regulation and kept on file in a school or school district office.[29] The term does not include financial or business records, or records that deal with groups rather than individuals.[30]

II. HISTORY OF THE RIGHT TO PRIVACY

The doctrine of the right to privacy is of recent origin, yet its roots go back to the ancient principles of common law.[31] According to Konvitz:

> "Zones of privacy" can be found marked off, hinted at, or groped for in some of our oldest legal codes and in most influential and philosophical writings and traditions. . . .
> Thus, mythically, we have been taught that our very knowledge of good and evil—moral nature, or nature as man—is somehow, by divine ordinance, linked with a sense and a realm of privacy.[32]

The earliest writings present man as a gregarious social being depending on society for protection, fellowship, and aid in obtaining sustenance. Primitive man was dependent for survival on his few possessions. The first rules, therefore, prohibited taking anything away from the rightful owner. The practices, rules, and moral codes concerning physical trespass came down through his-

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[26] *Id.*
[27] *Id.*
[28] A. Rezny, A Schoolman in the Law Library (1968).
[29] C. Erickson, A Practical Handbook for School Counselors 19-21 (1949).
[30] Traxler & North, Techniques of Guidance.
[31] L. Nizer, *Right of Privacy: A Half Century's Developments*, 39 Mich. L. Rev. 526 (1941).
[32] M. Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 Law and Contemporary Problems 272-273 (1966).

tory and were absorbed into common law.[33] Modern man discerned, however, that he owns far more than his physical property; attitudes, beliefs, ideas, and mores are also his possession.[34]

Once civilized man made the distinction between an "outer" and an "inner" man, between the soul and the body, it was impossible to avoid an idea of privacy.[35] The spiritual and the material were separated. A distinction was made between "rights inherent and inalienable and rights that are in the power of government to give and take away."[36] This established the difference between public and private rights, between society and solitude, and gave man the idea of a "private space" where he could be himself.[37] As society grew more complex, the desire and need for protection against both property and personal trespass became acute.[38]

Every group of people and every nation has established a code of behavior in the light of its moral values. The nation whose laws exerted the greatest influence on the formation of American law was England.

Privacy in England

Originally, physical violence was the only act against "personal" rights for which redress could be provided. The first recovery for civil assault, granted in 1348 or 1349, established, however, that human sensibilities can also be damaged.[39]

Men became increasingly aware that their reputation and honor were vulnerable. From such awareness resulted new court judgments on the intangible aspects of privacy trespass. The first of these judgments was for slander and was recorded in 1356.[40] In 1358 infringement on the right of ownership of literary and artistic creations was recognized by the courts.[41]

During the sixteenth century the Stationer's Company was formed and granted authority to "search for and seize seditious libel

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33*Id.*
34*Id.*
35*Id.*
36*Id.*
37*Id.*
38*Id.*
39Nizer, *Right of Privacy*, 527.
40Year Book, Lib. Ass., fol. 177, p. 19, The Cited 2. F. Pollock & F. Maitland, The History of English Law 536, Notice 6 (1911).
41Nizer, *Right of Privacy*, 527.

and [other] writings" at any time and in any location.[42] The company was authorized to seek out and destroy "puritan," or what was then considered dissenting, literature. During the sixteenth, seventeenth, and eighteenth centuries the powers of the Stationer's Company were reaffirmed, until held unlawful in 1760.[43]

Goodwill was accepted as a property interest in 1742.[44] Alienation of affection became a basis for legal action in 1745.[45]

The English people, therefore, possessed an awareness of the need for privacy of the spiritual as well as of the physical person. The American colonists carried the roots of this awareness and transplanted them in the new land across the sea.

Privacy in Eighteenth Century America

In America, the men who had left their mother country to seek freedom of thought and privacy for their beliefs felt that England continued to intrude on such freedom and privacy. The British Parliament issued "writs of assistance" to colonial revenue officers. The writs gave the officers authority to search for smuggled goods wherever they wished. The colonists, unhappy with such decrees, rebelled against this invasion of privacy.[46]

The right of privacy first became a public issue in the American Colonies in 1761 when James Otis, representing the Boston merchants, appeared in the Superior Court of Massachusetts Bay Colony. Otis protested the right of the collector of customs to use writs of assistance to enter and search any premises he wished. Otis lost his case, but he "struck the first blow for freedom from England."[47]

The eighteenth century Englishmen and American colonists did not exalt order over liberty nor public safety over private rights. Privacy was understood to be an indispensable condition for the growth of initiative and individuality, and for the full realization of man's potentialities. Two framers of the Constitution, Alexander Hamilton and James Madison, at first opposed a bill of rights. They

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42U. S., Congress, Senate, Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary; Right of Privacy Act of 1967, Hearing, 90th Cong., 1st Sess., April 4-6, 19-21, and May 17-19, 381 (1967).
43*Id.*
44Nizer, *Right of Privacy*, 527.
45Winsomore v. Greenback, Willes 577, 125 Eng. Rep. 1330 (1745).
46V. Packard, The Naked Society 305 (1964).
47U.S., Congress, Senate, *Right of Privacy Act of 1967*, Hearing, 368.

reasoned that "one of the dangers of a specific enumeration of rights was that some other rights of equal value or even greater value might not be protected by the Constitution."[48]

The framers of the Constitution were aware that the rights of property and the sanctity of the home were not the only basic rights. Other rights should protect a person from too much governmental interference. The American colonists experienced much abuse at the hands of the English Parliament and the Crown, as well as from American colonial officials. In the rights of "life, liberty and the pursuit of happiness"[49] lay more than merely physical aspects. Included were the right to opinion, ideas, and expression, the right to personal honor and dignity, and the right to privacy.[50]

Explicit constitutional protection of the concept of privacy was established in the Third and Fourth Amendments. The Third Amendment relates to the quartering of soldiers; the Fourth prohibits unreasonable searches and seizures.[51] Penumbrae of protection to the concept of privacy were established in the Fifth, Sixth, and Fourteenth Amendments.[52] The framers of the Constitution felt that privacy rights were covered thoroughly in the Bill of Rights.

Privacy in Nineteenth Century America

Industry and business emerged with the nineteenth century. As men produced more and more goods, they decided that any usurpation of the products of hands and minds created an invasion of privacy. Men were motivated to clarify their rights more precisely and passed laws for their protection. In 1803 trade secrets and trademarks were protected.[53] Americans were on their way to protecting all types of rights. Progress in this direction indicated that common law, in its natural course, would eventually expand to include the right of privacy.[54]

Before the 1880s there were no relevant federal cases on the issue of privacy. State cases existed, however, and judges closely examined official entries in the light of the Fourth Amendment.

[48] *Id.* at 382.
[49] Declaration of Independence.
[50] B. Schwartz, A Commentary on the Constitution of the United States, Part III, *Rights of the Person, Vol. I, Sanctity, Privacy and Expression*, 171 (1968).
[51] U. S. Const. amend. III and IV.
[52] U. S. Const. amend. V, VI, & XIV.
[53] Nizer, *Right of Privacy*, 528.
[54] *Id.* at 536.

Judges investigated each case thoroughly to ensure that probable cause was present in any search of private premises. Specific descriptions of objects to be seized were required in seizure warrants. In many cases, plaintiffs won trespass damage suits against government officials who acted without warrants, or with over-broad warrants.[55]

In 1886, in the case of *Boyd v. United States,* an act of Congress that invaded privacy was held unconstitutional.[56] The act authorized a court to require a defendant in a revenue case to produce his private books, invoices, and papers. If the defendant refused to produce his private possessions, his refusal was considered a confession of his guilt.

In 1890, Charles Warren and Louis Brandeis declared that the law had recognized the "right to be let alone" only during the previous half-century.[57] The establishment of this right was accomplished through elaborate opinions that attempted to justify the radical departure from precedent needed to recognize the right.

The right of privacy doctrine was further substantiated by a case involving the unauthorized use of a person's photograph. In the unreported case of *Manola v. Stevens,*[58] the defendant took a picture of the plaintiff who was on stage performing in tights. The New York State Supreme Court granted a temporary injunction preventing the publication of the picture. Later the injunction was made permanent because the defendant did not appear at the trial. Although the case upheld the doctrine of the right of privacy and recognized its existence, it denied recovery to the plaintiff.

In 1894 Justice John M. Harlan declared:

> We said in Boyd v. United States, and it cannot be too often repeated, that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employees of the sanctity of a man's home, and the privacies of his life. . . . Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely protection of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.[59]

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[55]Grumon v. Raymond, 1 Conn. 40 (1814); Sanford v. Nichols, 12 Mass. 286 (1816); Reed v. Rice, 25 Ky. 45 (1529); Anonymous 13 A.M. Dec. 31 (Ala., 1821); Holstead v. Brice, 13 Mo. 171 (1850); Humes v. Taber, 1 R.I. 464 (1850).

[56]Boyd v. U.S., 116 U.S. 616 (1886).

[57]C. Warren & L. Brandeis, *Right of Privacy,* 4 Harv. L. Rev. 193 (1890).

[58]Nizer, *Right of Privacy,* fn. p. 530.

[59]U.S., Congress, Senate, *Right of Privacy Act of 1967,* Hearing, 383.

A Massachusetts federal district court in 1894 held that the plaintiff waived his right of privacy by becoming a public character.[60] This decision showed that the court accepted in principle the doctrine of privacy. One year later, the New York State Court of Appeals held that there could be no right of privacy in the name and likeness of a deceased person.[61]

The first reaction to the liberal views on the right of privacy was noted in Michigan in 1899 when the Michigan Supreme Court denied an injunction to restrain the use of a dead man's name on a brand of cigars. The court said, "A disreputable person or criminal may select the most exemplary for his child or for his horse or dog or monkey. . . ."[62]

At the close of the nineteenth century, the right of privacy was generally recognized as a doctrine by the courts. In a society becoming more complex as industrialization took place, man became more aware of the importance of the rights of privacy.

Privacy in Twentieth Century America

The twentieth century began with legal opposition to the doctrine of the right of privacy. In 1902, the New York State Court of Appeals refused to "enjoin the use of a living person's picture on advertising posters."[63] The court relied on the fact that the works of Blackstone, Kent, and other common-law commentators made no mention of the right of privacy. In this decision, three dissenting judges pointed out "there was an equal lack of precedent against the privacy doctrine."[64] The judges stated they believed the law should keep up with advances in arts and sciences. After the decision was sharply attacked by the press,[65] Justice O'Brien forsook judicial convention and wrote an article in which he defended the decision, stating that the right of privacy was an attractive idea to moralists and social reformers, but was unworkable. Justice O'Brien predicted that if a statute creating the right were enacted, the lawmakers would be compelled to repeal it at the next session of the legislature.[66]

The first case to clearly recognize the privacy of the citizen as a

[60]Corliss v. E. W. Walker Company, 64 F. 280 (Mass., 1894).
[61]Schuyler v. Curtis, 42 N.E. 22 (N.Y., 1895).
[62]Atkinson v. John E. Doherty & Co., 80 N.W. 285 (Mich., 1899).
[63]Roberson v. Rochester Folding Box Company, 64 N.E. 442 (N.Y., 1902).
[64]Nizer, *Right of Privacy*, 532.
[65]N.Y. Times, Aug. 23, 1902.
[66]O'Brien, *The Right of Privacy*, 2 Col. L. Rev. 438 & 445 (1902).

right was *Pavesich v. New England Life Insurance Company.* In 1905 a Georgia court ruled that "every individual maintains a small private domain which the public may not invade."[67] The court stated that the right to speak, or not to be spoken to, are coexistent. The Constitution guarantees that, in personal liberty, one has the right to withdraw from the public as well as the right to assemble and speak in public. The opinion was generally considered a leading affirmation of "the existence of the right of privacy."[68]

In 1905 the Federal Trademark Act was passed. The act said that no portrait of a living person could be used as a registered trademark except by consent of that person in writing.[69]

In 1914 the United States Supreme Court held that, while the Fourth Amendment guarantees a measure of privacy, it carries no criminal sanction. The ruling prohibited the use in Federal courts of any evidence seized in violation of the Amendment.[70]

In 1916, efforts to codify the right of privacy were made by the New York State Legislature. The New York Civil Rights Law, as revised in 1921, prohibited the use for trade or advertising purposes of a name or picture of any living person without his written consent.[71]

In 1928 the issue of privacy was put before the Supreme Court in the landmark case of *Olmstead v. United States.* Olmstead and fifty others were charged with being members of a bootleg ring operating out of Seattle, Washington. Most of the evidence was based on wiretaps. The issue was as follows: Did the Fourth Amendment's proscription of "unreasonable searches and seizures" make wiretapping unconstitutional?[72] The answer, by a one-vote margin, was that it did not. Chief Justice William Howard Taft, writing for the majority, stated: "There was no search. There was no seizure."[73] In the dissenting opinion, Judge Louis Brandeis wrote:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the Govern-

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[67]Pavesich v. New England Life Insurance Co., 50 S.E. 68 (Ga., 1905).
[68]Schwartz, A Commentary, 176.
[69]Stat. L. 726 (1905), as amended 15 U.S.C. (1934) § 85.
[70]Weeks v. United States, 232 U.S. 383 (1914).
[71]N.Y. Civil Rights Law (McKinney, 1916), § 50, 51.
[72]Olmstead v. U.S., 277 U.S. 438 (1928).
[73]*Id.*

ment, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[74]

A 1933 Utah statute attempted a codification of the right of privacy. The statute limited recovery to cases where a name or picture had not been authorized for use in advertising or trade purposes and protected not only the living but also the deceased. The right of privacy was extended to public institutions as well as to natural persons.[75]

In 1952 Justice Douglas wrote the dissenting opinion in *Utilities v. Pollock*.[76] He stated that, in the midtwentieth century, the general right of privacy was part of the area of personal rights protected by the Constitution.

Liberty in the Constitutional sense must mean more than freedom from unlawful government restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedoms.[77]

In 1965 the Supreme Court recognized the constitutionality of the right to privacy, finding it to be within the penumbra of guarantees set forth in the Bill of Rights. The Court declared that the First, Third, and Fourth Amendments created zones of privacy that are beyond the reach of government intrusion.[78]

In *Warden v. Hayden* in 1967, Justice Douglas' dissenting opinion emphasized that privacy "means the individual should have the freedom to select for himself the time and circumstances when he will share his secrets with others and decide the extent of that sharing."[79] The giving of consent represents the exercise of choice in the extent an individual wishes to share himself with others. The free act of choosing is, in itself, the fulfillment of the claim to privacy. A meaningful choice has to be voluntary and, clearly, the will of the person whose words, beliefs, or behavior are to be shared.[80]

As a result of opinions such as that of Justice Douglas, the right of privacy became an established principle extended to all citizens of the United States.

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[74] *Id.*
[75] Utah Rev. Statutes (1933) § 103-4-7 to 103-4-9.
[76] Public Utilities Commission v. Pollock, 343 U.S. 451 (1952).
[77] *Id.*
[78] Griswold v. Conn., 185 S. Ct. 1678, 381 U.S. 479, 14 L. Ed. 2d. 510 (1965).
[79] Warden v. Hayden, 387 U.S. 294 (1967).
[80] *Id.*

Appendix 1 compares provisions of state constitutions to those of the federal Constitution concerning the right to privacy.

History of Access to Public Records

As the right of privacy became established, questions arose concerning the people's right to know. Personal lives are considered private, but are public lives exempt from the principle? The question is aimed particularly at the public's right of access to public records, documents, and other materials, regardless of physical nature, that are kept in the offices of public officials.[81]

Much of what has become American common law was carried from England by the Founding Fathers. The development of common law began early in England and was engrained in her sons who left for the New World.

Since there was very little contact between the English government and its subjects, records were not often required. With few records available, the people exerted little pressure for access rights.[82] Because of this lack of pressure, the English courts declared "there was no general common law right in all persons (as citizens, taxpayers, electors, or merely as persons) to inspect public records or documents."[83]

Pressure for access to public records increased as records were sought for use in pending or proposed litigation. The English courts recognized the right of access in cases of litigation and enforced it in two ways: (1) by a simple order if the record was in custody of someone already under jurisdiction of the court, or (2) by a writ of *mandamus* if the record was in the custody of someone not a party in the case or if the litigation had not started.[84] This led to the following rule:

> Every person is entitled to the inspection, either personally, or by his agent, of public records, including legislative, executive, and judicial records, provided he has an interest therein which is such as would enable him to maintain or defend an action in which the document or record sought can furnish evidence or necessary information.[85]

This rule was brought to the United States, but was fully applied

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[81] Cross, The People's Right To Know, viii.
[82] *Id.* at 25.
[83] *Id.*
[84] Norwack v. Auditor General, 219 N.W. 749 (Mich., 1928).
[85] 45 Am. Jur., *Records and Recording Laws*, Sec. 17, p. 427.

only "in adverse circumstances in older states which became committed to the English doctrine before its relaxation."[86]

Apparently, the English courts, in stating the nature of "interest" required for enforceable access to records, did not intend to limit access only to those involved in litigation. The intent was to *grant* the right of inspection in the circumstances stated, not to rule there was no right under any other circumstances.[87] Nevertheless, early decisions in the United States interpreted the rule in a narrow sense and refused access except when an applicant's interest was litigation. This view was slow in disappearing.

As time went on, desire for access to records for purposes other than litigation grew, and courts in both England and the United States relaxed their interpretation of interest. New Jersey[88] and Vermont[89] led the way to relaxation by common law while Michigan[90] and New York[91] led the way by statute.

As more people wanted access to public records for duplicating, abstracting, business purposes, and private gain, more reasons were accepted as justifying interest.[92] This increased pressure met with resistance from two sources—custodial (the vested interest in charging fees for copying) and judicial (the fear for interference in the business of records offices).

This resistance forced recognition of the need for statutes to open various classes of records to inspection and copying without the special interest required by common law.[93] As a result, substantial support was given for the following statement of common-law rule:

> A person may inspect public records in which he has an interest or make copies or memoranda thereof when necessity for inspection is shown and the purpose does not seem improper, and where the disclosure would not be detrimental to the public interest.[94]

Right of access to public records continued to grow as both the legislative and judicial branches of government supported this right.[95]

86Cross, The People's Right To Know, 26.
87*Id.*
88*Id.* at 27.
89Clement v. Graham, 63 A. 146 (Vt., 1906).
90Burton v. Tuite City Treasurer, 44 N.W. 282 (Mich., 1889), and Norwack v. Auditor General, *supra.*
91Egan v. Board of Water Supply of the City of New York, 98 N.E. 467 (N.Y., 1912).
92Cross, The People's Right To Know, 28.
93Boylan v. Warren, 18 Kan. 174 (Kansas, 1888).
94Cross, The People's Right To Know, 29.
95*Id.*

III. ANALYSIS OF STATE STATUTES

State statutes are a medium for regulating school and pupil records. Any agency, school, municipality, corporation, or board that has the power to regulate pupil records derives its authority from the state. If the statutes fail to specify who has authority to regulate pupil records, local school boards may make their own rules by process of resolution or by passing a motion acquiescing in established administrative procedure. Rules may also be influenced by common law and by opinions of the attorney general. In fact, statutes often incorporate these rules.

Public Records

The analysis of statutes concerning student records must start with a review of public records. In general, public records are most frequently defined as records required by state law to be made and kept. Kansas statutes define public records in a definite and precise manner:

> All official public records of the state, counties, municipalities, townships, school districts, commissions, agencies and legislative bodies, which records by law are required to be kept and maintained. . . .[96]

Indiana statutes include the following statement in a complete section defining public records:

> The term "public records" shall mean any writing in any form necessary, under or required, or directed to be made by any statute or by any rule or regulation of any administrative body or agency of the state or any of its political sub-divisions.[97]

Inspection

Forty-seven states have public record statutes. Although these statutes resemble one another in scope and language, their net effect varies considerably from state to state. For purposes of comparison these statutes can be divided into two main groups: those that require records to be open to the public and those that require records to be closed to the public. The difference between these groups lies in the right to inspect the records.

The states that allow open inspection of records operate on the principle that citizens have a right to know the actions of their government and that secrecy should be prohibited in the conduct of public business. This rule is commonly referred to as the "right to know doctrine." Because school districts are supported by public

[96] *Kans. Stat. Ann.* ch. 45-201.
[97] *Burns Ind. Stat. Ann.*, ch. 6, 57-602(1).

tax funds and are ordinarily classed as quasi-municipal corporations and subdivisions of state government, they come under this rule. A New Jersey statute illustrates "the right to know doctrine":

> Public inspection of pupil records may be permitted and any other information relating to the pupils of any school district may be furnished in accordance with rules prescribed by the state board, and no liability shall attach to any member, officer or employee of any board of education permitting or furnishing the same accordingly.[98]

Indiana sets forth this principle in a philosophical manner in its state statutes:

> Pursuant to the fundamental philosophy of the American Constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the state of Indiana that all of the citizens of this state are, unless otherwise expressly provided by law, at all times entitled to full and complete information regarding the affairs of government and the officials of those whom the people select to represent them as public official and employees.
> To that end, the provisions of this act shall be liberally construed with the view of carrying out the above declaration of policy.[99]

As a general rule, most statutes allow inspection of public records during normal office hours, at reasonable times, and at a reasonable fee. Maine's statute is exemplary:

> Every citizen of the state shall during the regular business hours of all such bodies or agencies, and on the regular business premises of all such bodies or agencies, have the right to inspect all public records, including any minutes of meetings of such bodies or agencies as are required by law, and to make memoranda abstracts. . . , except as otherwise specifically provided by statute.[100]

Iowa statutes, however, require inspection on demand and authorize a fee for copies:

> Every officer having the custody of public record or writing, shall furnish any person, upon demand and payment of the legal fees therefor, a certified copy thereof.[101]

Access

Practically all states that have public records have rules and regulations governing access to these records. Qualifications for access in the different states vary. For instance, the Arizona statute provides that "[p]ublic records are open to inspection by *any*

[98] *N.J. Stat. Ann.*, Tit. 18 A-3, 6-19.
[99] *Burns Ind. Stat. Ann.*, ch. 6, § 57-601.
[100] *Maine's Rev. Stat. Ann.*, Tit. 1, ch. 13, § 405.
[101] *Iowa Code Ann.*, Vol. 43, ch. 6.2246.

person" (emphasis added).[102] Alabama statutes provide that "*every citizen* has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute" (emphasis added).[103]

Louisiana gives the right of inspection only to electors and taxpayers, thus limiting somewhat the number of persons who may inspect public records.[104] Alaska statutes provide that a person who inspects records must have a "lawful occasion for access to public writings and records for those purposes subject to reasonable rules and regulations; in conformity to the direction of the court."[105] California law specifies several restrictions on access to pupil records:

> No teacher, principal, employee or governing board member of any public, private, or parochial school providing instruction in any of grades kindergarten through twelve shall permit access to any written records concerning any particular pupil enrolled in the school in any class to any person except under judicial process unless the person is one of the following:
>
> (a) either parent or a guardian of such pupil.
> (b) a person designated, in writing, by such pupil if he is an adult, or by either parent or a guardian of such pupil if he is a minor.
> (c) an officer or employee of a public, private, or parochial school where pupil attends, has attended, or intends to enroll.
> (d) a state or local law enforcement officer, including a probation officer, or administrator, or a member of a parole board, seeking information in the course of his duties.
> (e) the State Superintendent of Public Instruction, or a member of his staff, or a county superintendent of schools of the county where pupil attends, has attended, or intends to enroll, or a member of his staff.
>
> Restrictions imposed by this section are not intended to interfere with the giving of information by school personnel concerning participation in athletics and other school activities, the winning of scholastic or other honors and awards and other like information.[106]

Oregon's student record law requires all student records maintained by an elementary or secondary school to be confidential and open to inspection only in accordance with procedures adopted by

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[102] *Ariz. Rev. Stat. Ann.*, par. 39-122.
[103] *Code of Ala.*, Tit. 41, § 145.
[104] *LSA-RS*, Tit. 44, ch. 1, part 2, § (2).
[105] *Alaska Stat.* § 09.25.110.
[106] Cumulative Pocket Part through 1970 Session of Legislature, Art. 6, § 10751.

the local board of education. Specifically, however, student records are open to inspection by any parent or legal guardian upon request. The law was amended during the 1971 session of the Oregon Legislature to include a provision that declared conversations between certified staff members and students to be privileged.[107] Such conversations may not be revealed in court proceedings if the conversations tend to damage or incriminate the student or his family. Oregon's student record law, as amended, is reprinted in Appendix 6.

Custodianship

Custodians of public records are usually authorized by statute to oversee the records. The custodian implements the statute's provisions regarding the time inspections may be made, right to copy, the records to be kept, and the destruction of obsolete records. Connecticut establishes some of these duties:

> Except as otherwise provided by any federal or state statute or regulation, all records made, maintained or kept on file by any executive, administrative, legislative or judicial sub-division thereof, whether or not such records are required by any law or by any rule or regulation, shall be public records and every resident of the state shall have the right to inspect or copy such records.[108]

The custodian can refuse to allow access if he feels it would affect public security or the financial interest of the state. The person aggrieved may appeal to court. Connecticut's statutes provide that any

> . . . official who has custody of such public records shall refuse permission to so inspect or copy such record . . . if it would adversely affect the public security or financial interests of the state . . . or to provide reasonable protection to the reputation or character of any person. Nothing in this section shall deprive any person of any rights he may have had at common law prior to January 1, 1958.[109]

Delaware's statutes state that the

> . . . custodian of public records of their State shall upon request of the Commission, afford to it all proper and reasonable access . . . of all books, records, documents and papers of a public nature in their custody.[110]

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[107]Senate Bill 160.
[108]*Gen. Stat. of Conn.*, Tit. 1, ch. 3, § 1-19.
[109]*Gen. Stat. of Conn.* § 1-20.
[110]*Del. Code Ann.*, Tit. 29, par. 3329.

Most states impose penalties for violation of custodial rights. Some states make it unlawful for the custodian to withhold inspection, and some states impose a fine or prison sentence for allowing restricted information to be disseminated to the public.

States also give the custodian authority to destroy certain records. For example, a Kansas statute provides:

> The governing body of any school district may, by resolution, provide for and authorize any officer, official or employee charged with or having custody of the following records, documents or other papers to destroy the same after they have been on file for the period stated.[111]

The statute goes on to describe the records that may be destroyed after a certain number of years.

Pupil Records

Some states allow only limited public inspection of records, reasoning that open inspection would lead to an invasion of the pupil's right to privacy. By examining Mississippi's statute, it can easily be seen how pupils' rights may be invaded. The statute provides that pupil records kept in Mississippi shall include the following information:

> Date of birth, attendance records, mental and scholastic abilities, personal traits and characteristics, occupational interests, other pertinent information, health information.[112]

To protect the student as well as the teacher, the statute includes an exception clause stating that the pupil record:

> . . . shall be available to teachers and other school officials directly concerned with pupil's best interest. In no case, however, shall records be available to the general public.[113]

Arkansas gives the public a right to examine and copy public records, which the statute defines to include school records. As in Mississippi however, an exception clause protects the rights of pupils:

111*Kans. Stat. Ann.* ch. 72-5369.
112*Miss. Code Ann.*, (Supp. 1971) 6225-01.
113*Id.*, 6225-02.

It is the specific intent of this section that records such as . . . medical records, scholastic records . . . and other similar records which by law are required to be closed to the public shall not be deemed to be made open to the public under the provisions of this act.[114]

California has enacted a comprehensive statute on pupil records. Section 1887 divides the record code into public and private writings, with a separate set of rules governing each class. Section 1892 gives each citizen the right to inspect and copy public records. Section 10751, however, includes an exception clause that limits record access to certain specified persons (see quote at footnote 106).[115]

New Hampshire also has an exception clause:

. . . records pertaining to personal school records of pupils and records pertaining to . . . confidential . . . personal, medical . . . and other files whose disclosure would constitute invasion of privacy.[116]

Summary

In most states the only statutory law that applies to pupil records is in the form of statutes that describe and define all public records. A few states have statutes that expressly provide for the management of pupil records. There is an apparent conflict in the theory underlying record maintenance, with many states allowing unlimited access to all records whereas others attempt to shield some types of records from public scrutiny.

Statutes relating to public records or pupil records are listed in Appendix 2.

IV. ANALYSIS OF THE CASES

Court cases in the area of student records are few in number and generally have been litigated in states having student record statutes. Future trends, however, indicate increasing litigation in this sensitive field. The following analysis of the few cases on record may help the reader gain important insight into potential conflict areas, thus providing a legal platform on which intelligent administrative decisions may be based.

What Is a Public Record?

A public record is what the law or a court says it is. In *Amos v. Gunn*, the court offered the following legal definition of a public record.

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114 *Ark. Stat. Ann.*, Freedom of Information Act (1967), ch. 12-2804.
115 *West's Ann. Calif. Codes, Calif. Code of Civil Procedure*, § 1887, 1892 and 10751.
116 *N.H. Rev. Stat. Ann.*, Tit. VI, 91-A:5, § IV.

> . . . A public record is a written memorial made by a public officer authorized by law to make it. It is required by law to be kept, or necessary to be kept in discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said, or done.[117]

School districts are required by statute to keep records of varying importance and sensitivity. For example, the keeping of many school records is required by law for purposes of financial accountability. Other records are kept because of state board of education rules. Still other records are maintained at public expense for personal use of administrators and teachers because of local board of education policy. The latter records, though not strictly public records, are records nonetheless, primarily because public tax money is used to maintain them.[118]

Many school records are at best quasi-public records in that the public character of the documents has been diminished because of the subject matter they contain. Usually such records are classified as personnel records, cumulative student records, test scores, anecdotal records, and the like. Since these records are usually required to be kept by school officials, they take on a "public" appearance but retain "private" coloring because of the confidentiality of the subject matter. Thus a conflict sometimes arises between the competing claims of the public in its "right" to inspect records that are required by law to be kept and the "right" of the individual to privacy.

One such conflict arising from competing "public" and "private" interests was settled by a New York court in *Van Allen v. McCleary*. The court reasoned:

> In determining the means available to a parent to exercise this right [to an education] and to discharge this duty by keeping abreast of the child's development and advancement, the general common law principles concerning the right of inspection of records are of assistance. In applying these principles it serves no useful purpose to enter into the classifications of school records of pupils as being "public records" or "private records." Public they are, from the standpoint that the school district itself is a body corporate, . . . supported by taxes paid by the public; . . . Private they are, from the standpoint that the Commissioner has labelled certain of them confidential except "with the consent of the parent."
>
> Petitioner's rights, if any, stem not from his status as taxpayer seeking to review the records of a public corporation, but from his relationship with the school authorities as a parent who under compulsory education has delegated to them the educational authority over his child. Thus, the common law rule recognized . . . that when not detrimental to the

[117]Amos v. Gunn, 84 Fla. 285, 94 So. 615 (1922).
[118]King v. Ambellan, 12 Misc. 2d 333, 173 N.Y.S. 2d 98 (1958).

public interest, the right to inspect records of a public nature exists as to persons who have sufficient interest in the subject matter, is a guide.[119]

Do Notes Constitute a Record?

It has been held that notes of a clerk of the board of education are not official records until they have been transcribed.[120] It has also been held that names and other data associated with school district business are not public records when the data are stored, so to speak, in the mind of a school employee.[121] In *Caughlan v. Cowan*[122] the court held that the names of school district patrons, known only to the superintendent and some other members of the board, were not public records even though the names were of persons who allegedly were responsible in effecting a change in school district policy. Other "notes" when placed in a student personnel record folder may become a part of the record, thus assuming the characteristics of a quasi-public record. The court in *Valentine v. Independent School District*[123] said:

> The markings or records kept by teachers are, in a sense, public records, . . . it is necessary that records of different pupils be kept for the information of other teachers and school officers, since the statute provides for the keeping of graded schools. It would seem that such records are public records within the meaning of the law.

It would thus appear that records compiled and maintained by a public body take on the characteristics of public records because of the involvement of public tax money. It also appears that extraneous documents attached or recorded together with a public document may under certain circumstances assume the stature of a public record.

Do Property Rights Exist in the Management of Student Records?

By statute, public records are the property of the state; thus the general public cannot claim a right to any particular record. A private individual may inspect public records as permitted by statute or common law.[124] He may also make copies of certain documents.[125] He may even demand that certain public records

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119Van Allen v. McCleary, 211 N.Y.S. 2d 501 (1961).

120Conover v. Board of Education of Nebo School District 1, 267 P. 2d 768 (Utah 1954); Kottschade v. Lundberg, 160 N.W. 2d 135 (1968).

121Caughlan v. Cowan, 190 N.Y.S. 2d 934 (1959).

122*Id.*

123Valentine v. Independent School District, 174 N.W. 334 (Iowa 1919).

124Van Allen, *supra.*

125Clay v. Ballard, 87 Va. 787, 13 S.E. 262 (1891); Upton v. Catlin, 31 P. 172 (Colorado 1892); State *ex rel* Colscott v. King, 154 Ind. 621, 57 N.E. 535 (1900); People *ex rel* Gibson v. Peller, 181 N.E. 2d 376 (Illinois 1962).

be transmitted from a legal depository to a judicial hearing and be used as evidence.[126]

Custodianship generally rests with some legal authority, usually a public official charged by law to keep, maintain, and file those records entrusted to him by the state and its political subdivisions.[127]

The question arises as to ownership of records kept by school personnel that are not required by law to be maintained. Certainly personal records kept by individual teachers concerning their pupils' activities may well be the private property of that teacher if private funds are used to maintain the file. In the absence of a state law to the contrary, confidential records compiled by a school district on individual teachers are the property of the school district.[128] Individual teachers do not have a right to inspect such records without the express permission of the board of education.[129]

Four cases explain, to a certain degree, property rights associated with school records. In *Valentine v. Independent School District (supra),*[130] a senior girl requested a copy of her academic grades and a transcript of her high school record. The superintendent refused to comply with the request on the grounds the records were his personal property. The court ruled that the superintendent had a duty to furnish "something" to show that Valentine had completed graduation requirements. The court quashed the superintendent's claim to the grade records as his personal property by saying:

> . . . records kept by teachers about students are public records and not property of teachers or the school.

In *State ex rel Eggers v. Brown*[131] the court found that property interest in public records is limited by common law as well as statute law to inspection and, in certain instances, copying.

In a California criminal action, a journalist was convicted of fraud when it was found he had attempted to acquire an official transcript by forging a student's name to a request blank.[132] The court held that the state retained its property rights to the grade records even though legislation provided for inspection of public

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126Thurstin v. Luce, 61 Mich. 292, 28 N.W. 103 (1886).
127Detroit v. Board of Assessors, 51 N.W. 287 (1892).
128Board of Trustees of Calaveras v. Leach, 258 Cal. App. 2d 281 (1968); Valentine *supra.*
129*Id.*, Board of Trustees v. Leach, *supra.*
130*Id.*, Valentine, *supra.*
131State *ex rel* Eggers v. Brown, 134 S.W. 2d 28 (Missouri 1939).
132People v. Russell, 29 Cal. Rptr. 562, 214 A.C.A. 473 (1963).

records. The court based its decision on the determination "that the best interests of society are served by not opening to the general public the grades achieved by individuals."[133] The fear of misuse of such public records by individuals was deemed more important than allowing a strict adherence to state law.

There seems to be little doubt that the state and its political subdivisions hold property rights to certain records and that this right may be advanced in other areas as the circumstances dictate. In *Caughlan v. Cowan*[134] an interesting test of property rights arose when a member of the board of education requested that certain data, known only to the superintendent, be divulged to him. The court ruled in favor of the superintendent and said that "personal knowledge" is not a public record. Knowledge, therefore, is the property of the individual.

A similar case involving notes taken by a clerk of the board of education was settled in the same fashion. In this case, *Conover v. Board of Education*,[135] the court ruled that, in the absence of statute law, untranscribed notes taken by the clerk were not a public record until said notes were duly transcribed and only awaiting approval by the board. It would appear that the notes in question were the property of the clerk until they entered the realm of official board minutes. However, in certain instances notes made by teachers and placed in student record files may become a part of the student's record and therefore a public record in the sense that they may be inspected by persons having a legitimate interest in them.[136] Some notes may tend to be libelous, requiring that they be used with discretion.[137]

In summary, it seems that student records and other related data are the property of the state if so defined in the statutes. Student records maintained and compiled by a school district for educational purposes appear to be the property of the school district especially if public money was used to compile the record. It would also appear that a superintendent's thoughts are his personal property and that such knowledge cannot be forced from him on the grounds the knowledge constitutes a public record.

133*Id.*
134Caughlan, *supra.*
135Conover v. Board of Education, *supra.*
136Valentine, *supra.*
137Cawkins v. Billingsley, 172 P. 69 (Oklahoma 1918).

Who May Inspect Student Records?

Since certain student records are at least quasi-public in nature, several questions arise: Who may inspect such records, for what purposes, and when?

Public records that are required to be kept and maintained by public officials are open to public inspection during reasonable office hours.[138] Inspection of quasi-public records has been restricted mainly because of the sensitivity and confidentiality of the data contained in them. A general rule laid down by the courts may thus be stated: a person may inspect quasi-public records if the person can establish, to the satisfaction of the court, a justifiable interest in the record.[139]

May Board Members Inspect Student Records?

In *Caughlan (supra)* a newly elected board member demanded to see the records of his children and the records pertaining to expense accounts of certain school employees. The board member also asked the superintendent to supply him with the names of individuals who were allegedly responsible in influencing the board of education to change one of its policies. The superintendent refused to allow the board member access to any of the school's records, but was overruled by a majority of the board. The superintendent then gave the records of the board member's children and the expense account records to the board member for inspection. However, when a majority of the board of education refused to allow the superintendent to give the new board member the four names of school district patrons as requested, the board member sued. The court agreed with the majority of the board. As a father, the board member had supplied sufficient interest to warrant the inspection of his children's records. Also, since the expense accounts were required to be kept as a public record, they were open to inspection to anyone who could establish a legitimate interest in them. The unrecorded knowledge contained in the mind of the superintendent was not a public record, according to the court.

A Louisiana case was settled in a different manner. In *Wagner v. Redmond*[140] a member of the school board asked to see records containing the names and addresses of pupils enrolled in certain schools within the district. The superintendent refused the board

138Upton, *supra.*
139Matter of Egan, 205 N.Y. 147, 98 N.E. 467.
140Wagner v. Redmond, 127 So. 2d 275 (Louisiana 1960).

member's request on the grounds board policy prohibited him from giving the names and addresses to "anyone." The other members of the board supported the decision of the superintendent. At trial, the court ruled that records that show the names and addresses of students enrolled in the district fall under the state statute governing public records. Since Louisiana law allowed public access to such records, the board of education could not maintain a policy that contravened the state law. In effect, the board policy had amended state law. The court ruled the policy of the board of education inconsistent with state law and allowed the individual board member to inspect the records in question.[141]

A case having similar circumstances is *King v. Ambellan.*[142] In *King,* a board member asked to see some records compiled and maintained by the superintendent of the district. The records were not required by law to be kept, but were compiled by the superintendent in an effort to gather data concerning a special program that had been recently authorized. The board member, who opposed the special program, wanted the superintendent's data to compile a list of the names and addresses of students who were participating in the program. It was the intent of the board member to write to the students' parents expressing his opposition to the new program. The majority of the board of education wished to restrict the superintendent's data, thus frustrating their colleague's efforts, and passed a resolution to that effect. The court ruled that because the special program was supported by public tax funds and reflected the philosophy of the school district, it was in the public's interest and therefore was public business. The majority of the board could not suppress information that could be directly tied to a public interest. The individual board member was granted access to the data.

May Parents and Third Parties Inspect Student Records?

Since student records that are not required by law to be kept are at best quasi-public, what are the legal rights of parents with respect to access to records maintained by the school district concerning their children?

141Wagner illustrates a common practice in some school districts. Many policy manuals of boards of education intentionally or unintentionally amend the state law when statute language is incorporated into board policy. If the law is amended in the future and the board policy fails to reflect such amendments, the policy may in effect be contrary to the policy of the state. An unsuspecting administrator or board member attempting to enforce the out-of-date board policy may thus be led into a court action that could have been avoided.

142King, *supra.*

It has been held that persons who can show an interest in the records have a common-law right to inspect them.[143] Some boards of education have policies that spell out who may have access to certain information, and in some states the state board of education has promulgated rules that allow parents and other specified individuals access to student records.

School officials send extracts of certain student records to many people. Student transcripts are sent to colleges and universities at the request of the student; certain grades and enrollment records are sent to prospective employers at the request of the student; certain governmental agencies seek and are granted permission to inspect student records when such agencies show a justifiable interest or when the student is a client.[144] Use of student records is generally restricted, however, to those records that reflect a positive contribution to the student's attempts to secure employment or to gain entrance to an institution of higher or postgraduate education. Also, such records are usually requested by the student or parents to be sent to interested third parties.[145]

An early case, *Valentine v. Independent School District (supra)*, laid some of the common-law groundwork for the general rule that allows persons of interest the right to inspect or request the use of student records. In *Valentine,* the plaintiff refused to wear a cap and gown at the graduation ceremony, claiming the odor of the cleaning fluid made her ill. All but three of the seniors apparently refused to wear the caps and gowns provided by the school district. The superintendent refused to "graduate" the plaintiff on the grounds she did not participate in the final commencement ceremonies required by the board of education. Valentine requested that her grades be supplied to her so that she could enter a normal school, as she apparently felt she had "graduated" from high school. The superintendent refused to give her the grades and a copy of her transcript because he claimed the grades were his private property.

The court apparently felt the commencement ceremony was not a legal requirement for graduation, but was a ceremony held for the benefit of the students and their parents and friends to commemorate the ending of high school studies. The superintendent therefore had a duty to furnish "something" to show that Valentine had completed the requirements for graduation as required by law.

143Van Allen, *supra.*
144West's Ann. Cal. Code, Education Code, Art. 6, Pupil Records, § 10751.
145Van Allen, *supra.*

The court also ruled that grade records were not the property of the superintendent, teachers, or the school district since records kept by school personnel were public records. Thus the student and her parents were granted the right to request certain records and to inspect them.

More recent litigation also upholds the right of students and their parents to inspect personal records held by the school. In *Matter of Thibadeau, Jr.*,[146] a New York commissioner of education decision, parents were allowed to inspect records that included progress reports, grades, IQs, tests, achievement scores, medical records, psychological and pyschiatric reports, guidance notes, and evaluations. Most of this short decision is quoted here:

> Although certain records of the kind here involved are privileged and confidential . . . such privilege merely prevents the disclosure of the communication of record to third parties, i.e., to persons other than the parent and other than the person making the record. The "client" or "patient" within the meaning of the provisions referred to is the child and, since the child is a minor, and cannot exercise full legal discretion, the parent or guardian of the child. The parent, as a matter of law, is entitled to such information. It should be noted, further, that the education interests of the pupil can best be served only by full cooperation between the school and the parents, based on a complete understanding of all available information by the parent as well as the school.
>
> It is, of course, to be understood then, at the time of the inspection of such records by the parent, appropriate personnel should be present where necessary to prevent any misinterpretation by the parent of the meaning of the record, since some of the records here in question may not be properly evaluated and understood by some parents. . . .

An important provision of the *Thibadeau* decision is the suggestion that school districts provide personnel to interpret certain records to parents. This approach to the handling of certain student records does not restrict parental inspection of the records but does safeguard the student from possible misinterpretation of statistical and other such professionally written reports.

Another case in point is *Van Allen v. McCleary*.[147] Van Allen asked the East Meadow Board of Education to make available for his inspection certain psychological reports concerning his son. Van Allen was prompted to seek inspection of the reports because of some remarks made by certain faculty members of his son's school to the effect that his son was in need of psychological treatment and theorapy. Van Allen retained a private physician and

[146]Matter of appeal of Arthur T. Thibadeau, Jr., New York Commissioner of Education decision, 6849, September 22, 1960.

[147]Van Allen, *supra*.

requested that the school's psychological evaluation reports be sent to him for study. The school's psychologist sent the records as requested, but the board of education refused Van Allen's request, to see all the other records of his son. In refusing Van Allen's request, the board relied on its policy regulating the type of documents sent to parents. The board sent grade cards home but apparently little else. Other information was dispensed to parents through the medium of parent-teacher conferences and conferences with other staff members.

The New York Constitution was silent on the problem of parental inspection of student records, as was state law. The only legal pronouncement on the subject was found in the commissioner of education's rules, which provided that boards of education must "maintain for each child cumulative records covering the essential features of the health and physical education program." Health was defined to include "mental hygiene." Other rules required schools to keep such records confidential except as used by approved school personnel and "with the consent of the parents or guardians."[148]

Van Allen relied on *Thibadeau* to advance his argument. The board of education maintained that *Thibadeau* was not a regulation of the department of education and, therefore, was not applicable to any school system other than the one specifically mentioned in the decision. The court resolved the dilemma by turning to the common law. In its decision in favor of Van Allen, the court stated:

> Petitioner's rights, if any, stem not from his status as a taxpayer seeking to review the records of a public corporation, but from his relationship with the school authorities as a parent who under compulsory education has delegated to them the educational authority over his child. Thus, the common law rule recognized in *Matter of Egan* . . . to the effect that when not detrimental to the public interest, the right to inspect records of a public nature exists as to persons who have sufficient interest in the subject matter, is a guide.
>
> . . . The records here sought to be inspected are not, strictly speaking, public records. No statute exists which specifies those who are and those who are not entitled to inspect them. As has been noted above, the records are required by law to be kept, and it has been held that members and officers of local boards of education are public officers.
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> . . . It needs no further citation of any authority to recognize the obvious "interests" which a parent has in the school records of his child. We are,

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[148]New York Commissioner of Education Rules delegated by section 4 of Article 5 of the New York Constitution and Section 305 of the Education Law.

therefore, constrained to hold as a matter of law that the parent is entitled to inspect the records.
The court merely holds here that absent constitutional, legislative or administrative permission or prohibition, a parent is entitled to inspect the records of his child maintained by the school authorities as required by law.

In a California case, *Elder v. Anderson*,[149] a board of education released a statement to the public alleging misconduct of certain students. The board of education of Caruthers Union High School instructed the superintendent to send a letter to all parents in the district concerning some disciplinary problems of Elder and some other boys. The letter specified that additional details of the alleged problems were to be released at a public meeting.

The Education Code of California prohibited the giving of information concerning students to anyone except parents, guardians, school officials, and officials of cities, counties, the state, or the United States Government seeking information in the course of official duty.[150] Such information also could be given to guidance and welfare agencies if the student was a client. The appellate court ruled that if the allegations of the plaintiffs were true, the trustees had "stepped outside the protection of their office" and " . . . (would be held) responsible as to libel and slander . . . "

To summarize, in the absence of constitutional, legislative, or administrative rules, a parent has the right under common law to inspect public school records of his child because of the parental "interest" maintained in the parent-child relationship. Third parties may establish an interest in student records by statute, board policy, or under common-law procedures.

May Parents Inspect Student Records Absent an Educational Interest?

As a general rule, parents have the common-law right to inspect records of their children even though an overriding educational interest is not manifested. In *Dachs v. Board of Camden City of New York*[151] a father requested that the board of education allow him to inspect his daughter's records in order to find her current address. Apparently the parents were divorced and the daughter lived with her mother at an address unknown to the father. Although the father had visitation rights, the mother had informed the board that the father could not visit the child because of the pos-

149Elder v. Anderson, 23 Cal. Rptr. 18 (1962).
150West's Ann. Cal. Code, Education Code, Art. 6, Pupil Records, § 10751.
151Dachs v. Board of Education of the City of New York, 277 N.Y.S. 2d 449 (1967).

sibility he might harm her. The board of education cited this reason as an excuse in denying the father's request. The court found, however, there was no evidence to show that the father would harm the girl. Since the father had visitation rights, the court ruled the board could not legally deny him the right to see the child's records.

In *Marquesano v. Board of Education of the City of New York*[152] the court ruled quite differently on a similar set of facts. Here a parent also wanted names and addresses of the children to enforce visitation rights. The court ruled that a collateral purpose that involved enforcement of visitation rights under the divorce agreement was not a sufficient interest to furnish the names and addresses in question.

Student records have been used in court actions against third parties to prove the mental status of a child prior to brain injury. In *Johnson v. Board of Education*[153] a writ of *mandamus* was granted over the objections of the school to allow the records of an injured student to be used in court as evidence.

May Student Records Be Used in Educational Conferences?

In most conferences where parents and teacher sit down to discuss the child's educational achievement, records compiled by the teacher and the school are freely used. School personnel as well as parents have the statutory and common-law right to inspect and use student records compiled by the school.[154]

The use of student records at guidance conferences between the school and parents is also permissible. In *Madera v. Board of Education of the City of New York*[155] the use of disciplinary records in so-called guidance conferences was upheld. The New York school system used the guidance conference when students were suspended from school as a method to counsel parents and the student concerning his educational and disciplinary problems. Although the use of student records was not the main issue in *Madera*, the case illustrates the point that collateral usage of student records will normally be upheld by the courts.

Another example of the use of student records by school personnel within the context of discipline is provided by *Ferraro v.*

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[152]Marquesano v. Board of Education, 191 N.Y.S. 2d 713 (1959).
[153]Johnson v. Board of Education, 220 N.Y.S. 2d 362 (1961).
[154]Van Allen, *supra*. *See also* Thibadeau, *supra*. and Valentine, *supra*.
[155]Madera v. Board of Education of City of New York, 267 F. Supp. 356 (1967).

Board of Education of the City of New York.[156] *Ferraro* was a negligence action resulting from an injury that a student with a long history of disciplinary problems inflicted on a classmate. The school principal was found negligent in his duty because he failed to inform a substitute teacher about the student's disciplinary history. The court ruled the principal had the responsibility and duty to inform the substitute teacher, working on a temporary teaching contract, of children having special disciplinary problems. The court reasoned that if the substitute teacher had known about the child beforehand, she would have taken extra precautions to safeguard the other children.

Discipline records play an important part in the school's attempts to understand the child. Since New York law required such records to be maintained, every teacher who comes in contact with children having problems in school must have the right to inspect the school's records. A teacher under a regular contract has ready access to such records; a substitute teacher does not.

When May Student Records Be Used as Evidence at Trial?

One legal tool used to force school authorities to deliver student records to a court is called a *subpoena duces tecum.*[157] The use of such records at judicial hearings is well established in law, as the following cases illustrate.

In *Thurstin v. Luce*[158] attendance records were introduced at trial to show that the student was in school when he claimed he was elsewhere. In *Blandford v. McClelland*[159] it was held that public records were required to be made available at judicial hearings even though some records kept by public officials were not legally public records. The court ruled that when such records are needed at trial they must be made available.

Guidance counselors often write notes concerning students and sometimes place these notes in a personal file. In a discipline case a counselor offered her notes to the court and the notes were accepted into evidence.[160] The counselor's notes were detailed anecdotes concerning the student's past activities and incidents of mis-

[156]Ferraro v. Board of Education of City of New York, 212 N.Y.S. 2d 615, affirmed 221 N.Y.S. 2d 279 (1961).
[157]A process by which the court commands a witness to produce some documents or papers (records) at trial.
[158]Thurstin v. Luce, *supra.*
[159]Blandford v. McClelland, 16 N.Y.S. 2d 919 (1940).
[160]Andreozzi v. Rubano, 141 A. 2d 639 (Connecticut 1958).

behavior. It will be shown later that such altruistic practices sometimes meet with disastrous results.

In *Johnson (supra)*[101] it was shown that student records may be used in negligence actions to prove the prior mental status of a student who was injured. Another case in point that shows specifically why student records are allowed to play a role in judicial proceedings is *Marno v. Board of Education of the City of New York.*[102] This case was a *mandamus* proceeding to compel the board of education to allow the plaintiff, a former student, to inspect the school's records to find names and addresses of students who were enrolled in a particular class during the 1963-64 school year. The names and addresses were needed by the plaintiff to prepare a defense in a pending criminal action. The board refused the request on the grounds the records were confidential and privileged. The board also had a policy that prevented the schools from giving such information to private detectives, solicitors, collectors, or other such investigators. The court, in ruling in favor of the plaintiff, said:

> At common law the right to inspect records of a public nature not detrimental to the public interest, exists as to persons who have sufficient interest in the subject matter. . . . It has even been held that one's interest in public records need not be of personal concern. . . . In certain instances, however, the policy of free inspection may be superseded by statute or otherwise to preserve the confidentiality of the records sought to be inspected where confidentiality weighs more heavily in the public interest than the right to inspect.

The court cited another case, *Matter of Werfel v. Fitzgerald,*[103] which placed the court's position in proper perspective:

> . . . Where the defense of a person accused of a crime requires access to public records or even to records sealed from general examination, the right of inspection has a greater sanction and must be enforced.

The court ruled, therefore, that the right of inspection in order to prepare a defense in a criminal action outweighed the claim of confidentiality asserted by the board of education. The court's ruling made it perfectly clear, however, that the instant case was an exception to the general rule and that the board's policy as stated above would normally be given sanction "even if it defeated the common law right to inspect."[104]

Another case illustrating the need to have student records intro-

[101] Johnson, *supra.*
[102] Marmo v. New York City Board of Education, 56 Misc. 2d 517, 289 N.Y.S. 2d 51 (1968).
[103] Matter of Werfel v. Fitzgerald, 260 N.Y.S. 2d 791 (1965).
[104] *Id.*

duced as evidence at trial is *Knight v. Board of Education of the City of New York.*[165] In this instance, a mass suspension of 600 students was accomplished by the board to alleviate alleged overcrowding in an academic high school. Each student was expelled because of a poor academic record or a poor attendance record, which were the criteria used by the board to thin the student ranks. The plaintiff, in a class action, challenged the board's actions as a violation of due process, equal protection, and anti-discrimination laws. The student, arguing that the board did not follow its own criteria, demanded to have his academic record and attendance record entered into evidence to prove that he did not meet the so-called criteria. After the records were introduced, the plaintiff and many other students were reinstated in the high school because the school officials did indeed fail to observe minimum cut-off grade scores in many instances. The attendance records compiled by the school were also found to be inaccurate.

In *Matter of the Appeal of Watson*[166] a student's record was used against him in a disciplinary hearing. Watson challenged the school's decision to expel him on the grounds he did not have the opportunity to formulate a defense against the anecdotal record. It seems the record was introduced at the last minute without prior notification by the school officials. The New York Commissioner of Education ruled that the introduction of the anecdotal record at the conclusion of the hearing was prejudicial, and since the student was expelled illegally anyway, he was reinstated. A very early case, *Sanborn v. School District,*[167] revolved on a similar point. Records were introduced at trial with the only question being whether a proper foundation had been laid.

Do Test Scores Constitute a Record?

By and large, a parent has the right to inspect his child's test scores in the same context as he does any other record. A test score, however, should be interpreted by a qualified person at the time the parent inspects the score.

In this same light, does a group of parents organized together into a committee for the betterment of the public schools have the right to see and inspect test scores, accumulated over a period of time, that resulted from a series of tests administered to students in the

165Knight v. Board of Education, 48 FRD 108 (New York 1969).
166Matter of the appeal of Watson, New York Commissioner of Education decision, 8213, January 5, 1971
167Sanborn v. School District, 12 Minn. 17 (1866).

school system by school employees? This question formed the basis for a New Jersey decision, *Citizens for Better Education v. Board of Education of the City of Camden*,[168] decided by the commissioner of education on December 20, 1971. The Citizens for Better Education requested the board to make public the results of standardized achievement tests administered in the public schools "in a form which provides the mean or median for each grade in the elementary schools, and the national norms . . ." The request also stipulated that the test scores were a matter of public interest and concern and that release of said data would enable the citizens to become more aware of the educational achievement of students in Camden and to help the committee to better evaluate the education programs of the system.

The board of education argued that the testing program was a discretionary program and was not required by state law. Therefore the board was not required to make the test results public other than to each individual parent who attended conferences scheduled for that purpose. The board also argued that the results of the tests indicated increments of growth and broad performance data for four separate regions of the school district as well as the entire school district. Therefore the data were not conducive to easy or meaningful interpretation.

After extensive testimony from members of the Citizens for Better Education and members of the school district's administrative staff, the commissioner ruled:

> In the judgment of the Commissioner, the precise issue in the instant matter is whether the Board of Education is required to make public the results of its comprehensive battery of achievement tests in the form requested by petitioners. Local boards of education are not required to administer comprehensive achievement tests of basic skills. Nor are boards required to adopt or administer any standardized testing programs in the public schools . . . The decision whether or not to utilize any standardized test or any comprehensive battery of tests, and to what degree they should be utilized, lies entirely within the discretion of each local board, and this decision should be made purely on the basis of the value of such a testing program within the parameters of the total instructional plan for the public schools of the district.

The commissioner noted that results of individual performance test batteries, such as those in question, are made a part of the student's permanent record card. Such permanent records are, according to state law, open to the following individuals:

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[168]Citizens for Better Education v. Board of Education of the City of Camden, New Jersey Commissioner of Education decision, December 20, 1971.

> . . . persons who, in the judgment of the board of education or any officer or employee of the board designated by the board, have a legitimate interest in the records for purposes of systematic education research, guidance and social service.
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> . . . Items of information contained in the records of a given pupil shall be made available, upon request, for inspection by a parent, guardian or other person having custody and control of the child, or authorized representatives of the same . . .

The board of education retained the right, then, under color of state law, to withhold information that, in the judgment of the board, is "of a confidential nature or in which the applicant for such information has no legitimate interest."

The New Jersey law, entitled "Examination and Copies of Public Records" or the "right-to-know law" as it is sometimes called, did not require the board to produce the records in question. The commissioner ruled that since the testing program was not required by state law, the Camden Board of Education could, in its discretion, withhold publication of the program's results.

It would thus appear that parents seeking to hold boards of education accountable for educational achievement in New Jersey, and possibly other states as well, must rely on state law to help them establish an educational "interest" in obtaining access to group testing scores or other such data banks compiled by local school districts.

Are Student Records Privileged Information?

Teacher notes or anecdotal records do not enjoy total immunity from libel or slander. If placed in a student's personal record folder and exposed to public view, such notes may well be used as a basis for a defamatory action. It is a cardinal rule of guidance counselors that anecdotal records should be stripped to the bare facts and devoid of value judgments. Words such as "good" and "bad" are potentially dangerous terms loaded with slanderous connotations. Notes containing personal opinion that have been tentered on a student's record have been used in court suits.[169]

What Are the Defenses Associated with Defamatory Records?

Truth is an absolute defense in a defamation proceeding, as is the existence of an absolute or qualified privilege. Absolute privilege surrounds legislators, authors of military reports, counsels, wit-

[169]Dawkins v. Billingsley, 172 P. 69 (Oklahoma 1918).

nesses, and judges in court proceedings. It also covers executive officers and members of boards and commissions, which include school boards exercising their authority under color of law.

Although qualified privilege also is a complete defense in defamation suits, a defendant must have acted in good faith and the defamatory words must be limited in scope. Generally, qualified privilege surrounds a communication when it is offered at the right time to the right person, that is, someone who has a legitimate interest in the information.[170] For example, members of a board of education enjoy immunity from defamation when they discuss sensitive matters within the confines of a board meeting.[171] However, once the board meeting is adjourned and the board members take their places as members of the general public, their comments and communications are subject to the laws of libel and slander.[172]

There are at least five categories of qualified privilege: (1) interest of the publisher or self-defense; (2) common interest; (3) interest in others (a person has a right or duty to protect another party); (4) publication to one who acts to prevent a crime; and (5) the doctrine of fair comment (for publications that apply to matters of general public interest).

A classic case illustrating a defamatory action is *Dawkins (supra)*.[173] A teacher made an entry on a student's record that was required by law to be maintained. After the record found its way into the hands of several people not connected with the school, a libel action resulted. The teacher had written a note characterizing the student as having been "ruined by tobacco and whiskey." The court found for the student.

In another libel action, *Basket v. Crossfield*,[174] the court found for a college president who had written a letter to a student's father explaining that the son had been seen at his dormitory window exposing himself. The court ruled that the president's letter was written in good faith, contained no malice, and was written with the express intent of notifying the parent of impending disciplinary action against the son. In this context, the letter was surrounded by qualified privilege.

In *Kenny (supra)*[175] a similar letter was written to the parents of

170 Kenny v. Gurley, 208 Ala. 673, 95 So. 34 (1923).
171 Lipman v. Brisbane Elem. Sch. Dist., 4 Cal. Rptr. 8, 359 P. 2d 465 (1961).
172 Smith v. Helbraun, 251 So. 2d 553 (1964).
173 Dawkins, *supra*.
174 Basket v. Crossfield, 228 S.W. 673 (Kentucky 1920).
175 Kenny, *supra*.

a student who allegedly had contacted venereal disease of some type and had "not been living right." The court found no malice in the letter, which was written to the parents as required by university rules. The letter was qualified and the court held for the defendant.

In another case of qualified privilege, *Iverson v. Frandsen*,[176] a parent brought an action alleging a statement found in a student's psychological report was libelous. The court, deciding for the defendant, said:

> Absolute privilege statements or communications are confined to very narrow fields, such as judicial proceedings, statements of executive officers made in discharge of their duties and legislative proceedings. . . . Qualified privilege "rebuts the presumption of malice . . . and it is incumbent upon the complaining party to show malice from the language itself or extrinsic evidence."

The psychologist's reference to the student as a "high grade moron" was made in good faith, in a professional capacity, and represented a professional judgment. Therefore the statement was privileged.

The important points to be remembered in actions of this type are (1) what was the intent of the publication? (2) what was the intent of the writer? (3) was the publication written to a party of interest at the proper time and place? and (4) was the publication required by law or board policy?

May Student Records Be Copied?

If an individual has shown that he has a legitimate interest in a record of a student under statute or common law, he may copy the record.[177] One of the few cases on this point is *People ex rel Gibson v. Peller*.[178] Although this case deals with public records generally instead of student records, it establishes the common-law right of people of interest to make copies of public records. In the case *People v. Russell (supra)*[179] the point is made that only those people having a common-law interest may copy a student's record. In this case, however, Russell's attempts to have a copy made of another student's transcript were frowned upon by the court. Most states now have statutes providing for copying of public records.

176Iverson v. Frandsen, 237 F. 2d 898 (Utah 1956).
177Clay v. Ballard, *supra*; Upton v. Catlin, *supra*; State *ex rel* Colscott v. King, *supra*.
178People *ex rel* Gibson v. Peller, 181 N.E. 2d 376 (Illinois 1962).
179People v. Russell, *supra*.

Under What Circumstances May Student Records be Expunged?

The legal remedy of the individual denied the right to view public records, when there is a clear statute making certain records public in nature, is *mandamus*. But what is the remedy when the record contains some potentially defamatory or damaging material, and the student wishes the material not to be spread on the record. The remedy in this instance is expunction (or expunging) of the record.

Expunction is not automatic, since most state statutes are silent on the subject. It thus appears that the plaintiff either must ask the court specifically to expunge the record or must rely on the court to do so in its own volition. At any rate, expunction seems to be the most equitable judicial solution to ridding the record of false, incorrect, or otherwise harmful entries found not to have a basis in fact. There have been few cases where student records have been expunged. In a New York case, *Howard v. Clark*,[180] a student was accused of having a hypodermic instrument in his possession and of using heroin off school premises. The student was suspended for five days from school for insubordination and for having a physical or mental condition that endangered the health, safety, and morals of himself and other students. The school did not grant the suspended student a hearing before the suspension was imposed. The court found that the mere possession of an instrument associated with drug abuse and the suspicion of heroin use did not substantiate the reasons used by the school board to suspend the student. The court exonerated the student from the charges and ordered the record of the suspension expunged from the student's personnel records.

Another New York case involved a student charged with cheating on the Regents Examination.[181] The state department of education, which controlled the testing procedures, was notified by school officials of the alleged fact that the student cheated on the exam. The department of education proceeded to ban the student from repeating the exam for one year. The action of the department of education was based primarily on the report of school personnel in charge of monitoring the test. The student, taking her

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180Howard v. Clark, 299 N.Y.S. 2d 65 (1965). *See also* "EE" v. Board of Education of the Township of Ocean, New Jersey Commissioner Decision (1971); Matter of Watson, New York Commissioner Decision 8213; Matter of Bustib, New York Commissioner Decision 8257; Matter of Garber, New York Commissioner Decision 7850; Matter of Murphy, New York Commissioner of Education Decision 8409, January 31, 1972; Matter of Wilson, New York Commissioner of Education Decision 8421; Matter of Lawlor, New York Commisisoner of Education Decision 8452.

181Goldwyn v. Allen, 281 N.Y.S. 2d 899 (1967).

case to court, charged that she was not given a hearing by either the local school or the department of education. Since the Regents Examinations were considered important to students for many reasons, the court ruled that denial of the student's right to take the test without due process violated the student's constitutional rights under the New York Constitution and the Fourteenth Amendment to the United States Constitution. The court had the record expunged of any reference to the alleged misconduct of the student.

An Arkansas case, *Stewart v. Reng*,[182] was settled in a similar fashion. A student was suspended from school because he happened to attend a party where marijuana was used by some students. The plaintiff testified he did not use any of the marijuana and was not even aware other students were smoking it at the party. At the trial, the court found that a hearing was not given to the student by the university before the suspension penalty was assessed. The court also found that even if a hearing had been granted, evidence was so strongly in favor of the student that he would have been acquitted by the hearing board. The court ordered the charges dropped and the trial record expunged. All transcripts "and other permanent school records and all references to facts, circumstances and proceedings surrounding" the case were ordered expunged as well.

In *Sims v. Colfax*[183] plaintiff Sims, a girl, challenged a school board's rule concerning the grooming of hair. Her challenge was successful, the court declaring the board's grooming code as applied to girls unconstitutional. Sim's record was expunged of references to disciplinary action arising out of her refusal to conform to the grooming code.

A case of national impact, *Hammond v. Brown*,[184] arose out of the Kent State episode in 1970. After the deaths of four Kent State students, a grand jury was called to investigate the tragedy. The grand jury was to look into the events leading up to the shootings and to bring indictments against those students, school personnel, and others who were involved. Some twenty people were subsequently charged with riot, destruction of property, and arson. The findings of the grand jury were made public in a report that named the accused and outlined, in considerable detail, all of the alleged events, facts, and details surrounding the indictments. The report

182Stewart v. Reng, 321 F. Supp. 618 (1970).
183Sims v. Colfax, 307 F. Supp. 485 (1970). See also Church v. Board of Education of Saline area 339 F. Supp. 538 (1972).
184Hammond v. Brown, 323 F. Supp. 326 (1971).

was given wide publicity in the press and was circulated freely in the community.

As a result of the grand jury's investigations, the twenty students and professors who were indicted brought suit under the Civil Rights Act of 1871, section 1983. The plaintiffs argued that because of the grand jury's report and the publicity that had occurred, a fair trial was an impossibility. The court agreed.

The federal court found that the grand jury, in publishing its reports, had violated its oath of secrecy. The court also found that the plaintiffs were irreparably harmed by the report and the publicity generated by the report, so much so that a fair trial was impossible. The report of the grand jury was ordered expunged. Charges against most of the students and professors were later dropped.

The grand jury report was also found to be illegally written and issued without authority. The so-called Sheppard Rule,[185] as outlined in the widely publicized Sam Sheppard appeals, was cited as controlling. Adverse publicity surrounding possible litigation tends to be so harmful, said the court, that a fair trial under any circumstances cannot be guaranteed.

In *Joy v. Yankowski*[186] a student was suspended from school for distributing controversial literature on school property without permission. No due process was granted the student. After the plaintiff sued and was exonerated, he asked that the record be expunged, and it was so ordered by the court. This action illustrates the importance of asking for adequate relief. In this case, the student's request for expunction from his record of any notation of the disciplinary action connected with the incident prevented mootness[187] when the student graduated in the interim between reinstatement and the time at which a full hearing on the merits could have been held.

When Can Records Be Expunged?

From the few cases that constitute the basis for this section, four

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[185]384 U.S. at 363; 86 S. Ct. at 1522.

[186]Joy v. Yankowski, USDC, ED, New York, case no. 71 C 489, dated July 12, 1971.

[187]Mootness may be described as "one which seeks to get a judgment on a pretended controversy, or a decision in advance about a right before it has been actually asserted and contested, or a judgment on some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy." In *Joy*, the effect of the court expunging the record at the time it did had the direct effect of settling the controversy. The case would have been mooted if (1) Joy had graduated from school or (2) a hearing had been held and found Joy guilty or not guilty.

general rules concerning the expunging of student records seem evident. Records may be expunged when:

1. Due process is not afforded the student.
2. The student is suspended illegally or without basis of fact.
3. A report of an investigating body is given wide publicity, thus rendering a fair trial (hearing) impossible.
4. A report of an investigative (governing) body is illegal, or *ultra vires*.

It is imperative to note that the plaintiff should request that the record be expunged. Only in a few instances does the court order expunction on its own motion, and those instances are when statute law prevails, as in juvenile cases, or when circumstances dictate, as in the Kent State affair, where widespread publicity tended to diminish the plaintiffs' chances for a fair trial.

V. STATE BOARD OF EDUCATION RULES PERTAINING TO STUDENT RECORDS

A survey was conducted to determine to what extent state boards of education have promulgated rules pertaining to student records. Requests for copies of rules governing student records were sent to the commissioner of education of each of the fifty states, the District of Columbia, and the territory of Guam. Forty-nine commissioners responded to the request.

Table 1 shows the breakdown of the respondents in seven categories reflecting the status of rules as adopted by the states' educational policy-making bodies. Whereas twenty states have rules adopted at the state level, thirty-one states have no rules. Of the thirty-one latter states, eleven have current statute law that obviously governs the administration of student records within that state. Two additional states have attorney generals' opinions on which school districts rely in the administration of student records.

Massachusetts and Tennessee had legislation pending in the 1972 sessions of their legislatures. The state boards of education in Alabama, Connecticut, Indiana, Nevada, and Oregon were deliberating proposed rules at the time of the initial survey. Twenty-four states specifically delegated authority to establish rules governing student records directly to the local school districts.

TABLE I. RESULTS OF REQUESTS FOR STATE DEPARTMENT OF EDUCATION RULES CONCERNING STUDENT RECORDS

State	Have State Board Rules or Policies	Do Not Have State Board Rules	Attorney General Opinion	Local District Responsibility	Statute Authority on Pupil Records	Legislation Pending	Rules-Guidelines Pending
Alabama		x		x			x
Alaska		x		x			
Arizona		x	x				
Arkansas	x				x		
California		x			x		
Colorado		x			x		
Connecticut		x		x			x
Delaware		x		x	x		
District of Columbia	x						
Florida		x		x	x		
Georgia		x		x			
Hawaii	x						
Idaho	x						
Illinois		x	x				
Indiana		x		x			x
Iowa		x			x		
Kansas		x		x			
Kentucky		x		x			
Louisiana	x						
Maine		x		x			
Maryland	x				x		
Massachusetts		x		x		x	
Michigan		x			x		
Minnesota	x						
Mississippi		x		x			
Missouri		x			x		
Montana	x						
Nebraska		x		x			
Nevada		x		x			x
New Hampshire	x						
New Jersey	x						
New Mexico	x						

TABLE I. RESULTS OF REQUESTS FOR STATE DEPARTMENT OF EDUCATION RULES CONCERNING STUDENT RECORDS (Continued)

State	Have State Board Rules or Policies	Do Not Have State Board Rules	Attorney General Opinion	Local District Responsibility	Statute Authority on Pupil Records	Legislation Pending	Rules-Guidelines Pending
New York	x						
North Carolina		x		x			
North Dakota		x		x			
Ohio	x						
Oklahoma	x						
Oregon	x			x	x		x
Pennsylvania	x						
Rhode Island		x		x			
South Carolina	x						
South Dakota		x		x			
Tennessee		x		x		x	
Texas		x		x			
Utah		x		x			
Vermont	NR						
Virginia	x						
Washington	x						
West Virginia		x		x			
Wisconsin		x		x			
Wyoming		x			x		
Guam	x						
Totals	20	31	2	24	11	2	5

NR—No Response

One of the most comprehensive handbooks pertaining to student records in the United States is New York State's *Manual on Pupil Records*,[188] which was revised in 1965 and has since been reprinted. Because the handbook is too large to include as an appendix to this monograph, the essential components of the policy are briefly reviewed here.

The manual's table of contents contains the following headings: pupil records and the law: purposes of pupil records: important pupil record considerations: suggested pupil record areas and items; types of pupil records: school staff orientation to pupil records; gathering, entering, and interpreting pupil record information: parent, pupil, and community orientation to pupil records: and suggested readings on pupil records.

The manual includes a comprehensive and thorough analysis of state case law applicable to pupil records. More importantly, though, it outlines the basic purposes and contents of student records for teachers, administrators, board members, parents, and the lay public. School boards especially must not overlook basic understandings of such important items, not only from a public relations viewpoint, but also from a fundamental desire to escape litigation.

The contents of chapter 9, "Parent. Pupil and Community Orientation to Pupil Records," illustrate New York's attempts to educate its lay citizens and professional employees in student record management. Subtopics are as follows: definition of a pupil record; records making up the pupil record: general purposes and use of records; assistance provided by the pupil record; content of the pupil record: rights of parents and pupils with respect to records; record responsibilities of parents and pupils: and reports to and from specialized personnel and agencies. The manual summarizes the importance of orientation as follows:

> A pupil records system does not and can not satisfactorily fulfill its purposes unless pupils, parents and community are oriented to the system. With such orientation, they help provide and use the information which is essential for understanding the pupil and his educational needs. There must be a clear understanding of the school's working arrangements, including referral procedures and transmittal and receipt of information, with outside agencies and services, employers, and higher educational institutions.[189]

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[188]Manual on Pupil Records, Albany: The University of the State of New York, The State Education Department, 1965.

[189]*Id.* at 51.

The New Mexico State Department of Education studied the problem of confidentiality of student records and adopted guidelines for school personnel (see Appendix 3). The guidelines include criteria for disclosure of student records to the student himself, faculty and administrative officers, parents, educational institutions and agencies, governmental agencies, other individuals and organizations, and telephone inquiries. Distinguishing between records that are sensitive and those that are not sensitive, the guidelines require that the student's permission be obtained before certain records are disclosed to third parties. If certain student records are subpoenaed, the student must be notified and the subpoena referred to the school's legal counsel. Investigative agencies of any level of government do not have an inherent right to unlimited access to student records unless release of such information is mandated by a court order or a subpoena.

Whereas New Mexico grants discretion in the release of student records largely to the local educational employee, New Jersey restricts third party access to student records and, before records can be examined, requires permission from the local board of education or from an officer or employee designated by the board to act for it. The New Jersey rules also provide for the unlimited inspection of student records by the student himself after he has reached the age of twenty-one. Access to records by the student's parents or guardian is denied when the student reaches twenty-one years of age (see Appendix 4).

Rules adopted by the New Hampshire State Board of Education separate disciplinary records and counseling files from the so-called academic records. Access to disciplinary records is restricted to authorized persons with consent of the student "except under legal compulsion or in cases where the safety of persons or property is involved." Schools are prohibited from compiling records reflecting political activities or beliefs of any student. The New Hampshire rule also provides for "the destruction of non-current disciplinary records" (see Appendix 5).

Finally, Minnesota's Department of Education suggests that each local school board develop a policy on release of student information. Minnesota has developed a policy guide defining permanent and cumulative records. Both the permanent and cumulative records are divided into two groups, one for internal use and the other for release under certain circumstances (see Appendix 7).

No effort was made to evaluate these state board of education rules to see whether they meet any preestablished criteria. Each rule does answer at least one of the questions raised in this monograph as to type of record, custodianship, access, and inspection.

VI. SUMMARY AND CONCLUSIONS

Three general truths appear to manifest themselves as a result of this monograph. First, man is an extensive record keeper. Second, man is overly curious. And third, man seeks to protect himself from others by jealously guarding his individual privacy. All three characteristics seemingly collide head on in the arena of public school records.

The need for modern government to maintain and enlarge its records and record-making capacity hinges on the comparative size of government and its complexity. The larger and more complex the government, the larger and more pressing the need for detailed and personalized records. Conversely, the more records kept, the greater the need of citizens to know the contents and scope of the records. This need is twofold: first, knowing the contents satisfies curiosity; and second, knowing the contents helps the citizen to protect himself against government encroachment and against other individuals.

The conflict that ultimately arises in the struggle between individuals and governments that make and keep records raises questions as to who gets to inspect what record and on what basis. Governments have attempted over the years to answer these questions. Statutes have been written to characterize certain documents as "public," thus making them available for inspection by private citizens. In areas where statute law is silent, the courts have entered the breach and opened certain records to individuals who can show a justifiable interest in the document. An uneasy truce has thus been attained between government and the individual citizen.

Student records may be both public and private. They are public because some are required by law to be maintained by public officials. They are also private because of the highly personal and sensitive subject matter sometimes contained in them. Thus student records may be deemed quasi-public records. This unique

situation has not been adequately defined nationwide by state statute or common law. Some state boards of education and a few local boards of education have detailed rules concerning the handling of student records and other school records. However, much work needs to be done in this area. Relatively few court cases concerning student records have been decided over the years and sometimes these decisions are not helpful in solving conflicts arising in areas of the country other than where the case was decided.

In the absence of statute law or board of education rules, student records may be inspected by individuals who have a justifiable interest in the particular record. Parents, for example, usually may inspect their child's school record. Citizens may inspect certain school records required by law to be maintained. It is at this juncture that the subject matter contained in the record becomes important. Many courts have held that third parties do not have a right to inspect school records that have been classified as confidential, personal, or "nonpublic." On the other hand, courts have ruled that teachers and administrators are interested parties and may inspect and use confidential records in educational conferences with parents or with their colleagues on a professional basis.

The use of confidential and sensitive records is restricted in most instances. An individual may request his school record to be used as evidence in a court action if, for example, the individual is preparing a defense for a criminal proceeding.

Anecdotal records are a legitimate tool of school personnel in their attempts to understand the children under their control. Such records, however, are usually of a sensitive nature requiring that they be maintained with great care. A number of defamation of character actions have arisen because of entries made by teachers in students' anecdotal records. Professional personnel should exercise great discretion in the use of anecdotal records as a depository for personal judgments concerning students. Teachers and administrators do not enjoy absolute immunity from libel and slander as do board members in a lawful board meeting: thus teachers and administrators are more vulnerable to court actions in this area.

Individuals who have manifested a justifiable interest in a particular student record have the right to copy that record for their personal use. The copying of such records is usually governed by reasonable rules as to time, place, and cost.

A student has the right to protect himself from false and malicious statements placed in his school record. If it can be shown that the record contains false information potentially damaging to the student, he can request the court to expunge such information from the record. Generally, the student may also request expunction if he is found innocent of charges made against him in a disciplinary proceeding or if the board of education failed to give him a hearing as a result of a disciplinary proceeding. Adverse publicity surrounding an incident may also be the basis for a court to expunge the record.

Much, if not all, of the data compiled by a school system on each student is filed in one cumulative record folder. Because the folder contains much information of a confidential nature as well as routine information required by law, access to the data contained in the file must be limited. Consequently, conflicts often arise when individuals want to inspect certain information in the file and the school board refuses to allow access. A simple solution to this problem is suggested here.

A new system of record keeping would separate the information collected about a student into categories depending on the extent of confidentiality. These categories would be classified from liberal to highly confidential and would dictate who is entitled to access to the information.[190]

One body of information could consist of records required by law to be kept. The data would include such items as name of the child, sex, place of birth, names of parents or guardians, addresses, telephone numbers, credits earned, enrollment dates, class rank, graduation date, honors, activities, and other general information. All persons with a justifiable interest as defined by board policy would be allowed access to this information.

Another category could include more confidential and sensitive records not necessarily required by law to be maintained. These

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[190]Martha L. Ware, *Law of Guidance and Counseling* (Cincinnati: The W. H. Anderson Company, 1964), 178 PP.; Richard Dobbs Strahan, *Legal Briefs for School Administrators*, Series 1966-65 (Houston: Gulf School Research Development Assn., 1966); *Guidelines for the Collection, Maintenance and Dissemination of Pupil Records* (Report of a conference on the ethical and legal aspects of school record keeping, Sterling Forest, N. Y.), (Hartford: Russell Sage Foundation. Connecticut Printers, Inc., 1970), 48 pp.; Charles Lister, *The Confidentiality of Pupils' School Records: A Background Paper for the Working Conference to Consider Certain Legal Aspects of the School Counselor Role* (New York: Russell Sage Foundation, May, 1969), 71 pp.; Maurice H. Heayn and Howard L. Jacobs, "*Safeguarding Student Records*," Personnel and Guidance Journal, September, 1967, pp. 63-67.

records could contain such items as disciplinary actions, family financial data, intelligence test scores, achievement scores, teacher ratings, psychological and psychiatric evaluations, social service reports, medical information, legal actions, and other related data. These records would be filed in a restricted area of the school and released only to parents and other persons identified by the parents.

If such a record-keeping plan were to be adopted by a school district, a definite board policy should be developed that answers the following policy questions:

1. *Questions involving administration of student records*

Who shall bear primary and secondary responsibility for the administration of the student records system?

Who shall be responsible for planning and organizing the system?

How shall the student records system be staffed?

What plan is best for the inservice development of the teachers and administrators in the area of student records?

How should the student records system be coordinated with other departments and units in the school district?

What unitary budgeting shall be established for this system, and who shall bear responsibility for the preparation and administration of the budget?

2. *Questions involving collection of student records*

Should the records management system be centralized or decentralized?

What forms shall be required for collecting and recording information about the child?

Shall direction be given for the collection of data that are free from speculation, labelling, and irrelevant information?

Shall direction be given to obtain information from the most reliable, primary, and authoritative sources?

Shall the parent be informed concerning all the data collected and maintained about his child?

3. *Questions involving control of student records*

Should a computer be used to store data from student records or is paper storage sufficient?

What physical facilities will be needed for the storage of data?

How shall security as well as accessibility be provided in the location, housing, and use of student records?

Shall the cumulative folder be retained as a repository for all information collected about the school child?

How shall records from outside agencies, such as records of psychological or medical examinations, be managed?

How shall data be managed to facilitate storage and retrieval after the child leaves school?

How long shall data be maintained after the child leaves school?

4. *Questions involving release of student records*

What information may be released, to whom, and under what circumstances?

Who shall be available to interpret data when inspection of records is allowed?

Shall parental permission be required for releasing or transferring the records?

What forms shall be required for releasing or transferring the records?

A well-developed policy incorporating the issues above would go a long way toward solving the student record dilemma.

APPENDIX 1—COMPARISON OF STATE CONSTITUTIONS TO THE FEDERAL CONSTITUTION CONCERNING RIGHT OF PRIVACY

	Freedom of religion, speech, press	Quartering soldiers	Searches & seizures	Right of accused	Right of speedy trial	Citizenship rights/ Inalienable rights
U.S. Const. Amend.:	1	3	4	5	6	14
	Art. & Sec.	Art. & Sec.	Art. & Sec.	Art. & Sec.	Art. & Sec.	Art. & Sec.
Alabama	1-3, 4	1-28	1-5 1	1-6	1-6	1-1
Alaska	1-4, 5	1-20	1-14	1-11	1-9	1-1
Arizona	2-6, 12	2-27	2-8	2-10	2-11	.....
Arkansas	2-6, 24	2-27	2-15	2-8	2-8	2-2
California	1-4, 9	1-12	1-19	1-13	1-13	1-1
Colorado	2-4, 10	2-22	2-7	2-16	2-16	2-3
Connecticut	1-3, 4	1-17	1-7	1-8	1-8	.....
Delaware	1-1, 5	1-18	1-6	1-7	.....	.....
Florida	1-3, 5	1-22	1-7	1-10	1-10	1-1
Georgia	1-2-112, 2-115	.....	1-2-116	1-2-106	.....	.....
Hawaii	1-3	1-16	1-5	1-11	1-11	1-2
Idaho	1-9	1-12	1-17	1-13	1-13	1-1
Illinois	2-3, 4	2-16	2-6	1-9	1-9	2-1
Indiana	1-2, 9	1-34	1-11	1-13	1-12	1-1
Iowa	1-3, 7	1-15	1-8	1-10	1-10	1-1
Kansas	BofR*-7, 11	BofR-14	BofR-15	BofR-10	BofR-10	BofR-1
Kentucky	BofR-5, 8	BofR-22	BofR-10	BofR-11	BofR-14	BofR-1
Louisiana	1-4, 3	.....	1-7	1-11	1-9	.....
Maine	1-3, 4	1-8	1-5	1-6	1-6	1-1
Maryland	Art. 36, 10, 41	Art. 31	.....	Art. 22 J	Art. 21	.....
Massachusetts	Pt. 1-Art. 2, 16	Pt. 1-Art. 27	Pt. 1-Art. 14	Pt. 1-Art. 12	Pt. 1-Art. 11	Pt. 1-Art. 1
Michigan	1-5	1-8	1-11	1-20	1-20	.....
Minnesota	1-3, 16	.....	1-10	1-7	1-6	.....
Mississippi	3-18	.....	3-23	3-26	3-26	.....
Missouri	1-5, 8	1-24	1-15	1-19	1-18(a)	1-2
Montana	3-4, 10	3-22	3-7	3-18	3-6, 16	3-3
Nebraska	1-4, 5	1-18	1-7	1-12	1-11	1-1
Nevada	1-9	1-12	1-18	1-8	1-8	1-1
New Hampshire	Pt.†1-5,22	Pt. 1-27	Pt. 1-19	Pt. 1-15	Pt. 1-14	.....
New Jersey	1-3, 6	1-16	1-7	1-10	1-10	1-1
New Mexico	2-11, 17	2-9	2-10	2-15	2-14	2-1
New York	1-3, 8	.....	1-12	1-6	1-6	.....
North Carolina	1-20, 26	1-36	1-15	1-11	1-18	1-5
North Dakota	1-4, 9	1-12	1-18	1-13	1-13	1-1
Ohio	1-7, 11	1-13	1-14	1-10	1-10	1-1
Oklahoma	2-22	2-14	2-30	2-21	2-20	2-2
Oregon	1-1, 2, 8	1-28	1-9	1-12	1-11	1-1
Pennsylvania	1-7	1-23	1-8	1-9	1-9	1-1
Rhode Island	1-3	1-19	1-6	1-13	1-10	.....
South Carolina	1-4	1-26	1-16	1-17	1-5	.....
South Dakota	6-3, 5	6-16	6-11	6-9	6-7	6-1
Tennessee	1-3, 19	1-27	1-7	1-9	1-9	.....
Texas	1-6, 8	1-25	1-9	1-10	1-10	.....
Utah	1-4, 15	1-20	1-14	1-12	1-12	1-1
Vermont	Ch.§1-Art. 1, 13	.....	Ch. 1-Art. 11	Ch. 1-Art. 10	Ch. 1-Art. 10	Ch. 1-Art. 1
Virginia	1-12, 16	.....	1-10	1-8	1-8	1-1
Washington	1-5, 11	1-31	1-7	1-9	1-22	.....
West Virginia	3-7, 15	3-12	3-6	3-14	3-14	1-1
Wisconsin	1-3, 18	.....	1-11	1-8	1-7	1-1
Wyoming	1-18, 20	1-25	1-4	1-11	1-10	1-2

*BofR—Bill of Rights †Pt.—Part §Ch.—Chapter

APPENDIX 2

STATUTES RELATING TO PUBLIC RECORDS OR PUPIL RECORDS

Code of Alabama, Title 41, Sec. 145, 146, 147.
Alaska Statutes, Title 9, Sec. 09.25.120, 14.14.090.
Arizona Revised Statutes Annotated, Sec. 39-121, 15-201.
Arkansas Statutes Annotated, Act 93, 1967, Sec. 3, 4, 6; Section 12-2802, 14-2804.
West's Annotated California Code, Civil Procedure Code, Sec. 1887, 1888, 1892; Educational Code, Art. 6, Sec. 10751.
Colorado Revised Statutes, Act of 1967, 113-2-1, 113-2-4, Par. 3a; 123-1-12.
General Statutes of Connecticut, Title 1, Ch. 3, Sec. 1-7, 1-19, 1-20, Title 10, Education Sec. 10188, 10-209.
Delaware Code Annotated, Title 29, Sec. 29-3327, 29-3329.
Florida Statutes Annotated, Ch. 119, Sec. 119.01, 119.02, 119.03, 119.11; Exception Sec. 15-23.
Code of Georgia, Ch. 40, Sec. 40-2701, 40-2702, 40-2703; Ch. 32, Sec. 907; Ch. 9, Sec. 604 (14), (14a).
Hawaii Revised Statutes, Title 8, Ch. 92, Sec. 2; Ch. 7A, Sec. 7A-1, 7A-4, 7A-7.
Idaho Code, Volume 10, Ch. 59-1009; Volume 2, 9-31.
Illinois Annotated Statutes, Ch. 116, Sec. 43.4, 43.5, 43.6, 43.7; Ch. 122, Sec. 10.7.
Burns' Indiana Statutes Annotated, Volume 11, part 1, Ch. 6, Sec. 57-601, 57-602, 57-605, 57-606.
Iowa Code Annotated, Volume 43, Ch. 622.46.
Kansas Statutes Annotated, Ch. 45-201, 45-202, 45-203; Ch. 72-5369, 72-7515.
Kentucky Revised Statutes Annotated, Ch. 171.650; Ch. 12.080.
West's LSA Revised Statutes, Title 44, Ch. 1, Part I Secs. 1-7, 31-38.
Maine Revised Statutes Annotated, Title 1, Ch. 13, Sec. 405.
Maryland Annotated Code of Maryland, Volume 5B, Art. 54, Sec. 5, Sec. 7.
Annotated Laws of Massachusetts, Volume 2B, Ch. 66, Sec. 10.
Michigan Statutes Annotated, Volume 25, Sec. 28-760, 28-492; Volume 21, Sec. 27A-2165.
Minnesota Statutes Annotated, Volume 3, Ch. 15.17.
Mississippi Code (1942) Annotated, 1971 Cumulative Supp., Volume 5, Sec. 6225-01, 6225-02.
Vernon's Annotated Missouri Statutes, Sec. 109.180, 199.190; Sec. 536.020.
Revised Codes of Montana, Title 93, Sec. 93-1001-1, 93-1001-2, 93-1001-41, 93-1001-5, 93-1001-10, 93-701-4.
Revised Statutes of Nebraska, Sec. 84-612, 84-612.01, 84-712.02; 25-1280; 14-816.
Nevada Revised Statutes, Sec. 239.010, 239.020, 239.030.
New Hampshire Revised Statutes Annotated, Ch. 8B-7, Title VI, 91-A:1, 91-A:2, 91-A:4, 91-A:5.
New Jersey Statutes Annotated, Sec. 47:1A-2, 47:1A-3, 47:1A-4; Sec. 18A:36-19.
New Mexico Statutes 1953 Annotated, Sec. 71-5-1, 71-5-2, 71-5-3.
McKinney's Consolidated Laws of New York Annotated, Education Law Sec. 144, 145, 146; 2116a.
General Statutes of North Carolina, Sec. 132-1, 132-2, 132-6.

North Dakota Century Code, Sec. 44-04-18.
Page's Ohio Revised Code Annotated, Sec. 149.43, 149.55, 149.00.
Oklahoma Statutes, Annotated, Ch. 1, Sec. 24, Ch. 12, Sec. 486.
Oregon Revised Statutes, Educational and Cultural Facilities, Sec. 336-185, 336-195; 336-205, 336-205; 192.005, 192.010, 192.020, 192.030.
Purdon's Pennsylvania Statutes Annotated, Title 65, Sec. 66, Sub. Sec. 1-4.
Code of Laws of South Carolina, Sec. 9-11, 9-12.
South Dakota Compiled Laws, Title 48, Sec. 48-0701.
Vernon's Texas Rules Annotated, Sec. 5441A, Par. 1, 2, 6.
Tennessee Code Annotated, Title 15, Sec. 15-304, 305, 306, 307, 406.
Utah Code Annotated, Title 78, Ch. 26, Sec. 78-26-1, 78-26-2, 78-26-3: 103-4-7 to 4-9.
Code of Virginia, Sec. 1743.
Revised Code of Washington, Sec. 40.04.010.
West's Wisconsin Statutes Annotated, Ch. 18, Sec. 18.01, Par. 1, 2, 4.
Wyoming Statutes, Sec. 9-692.2, 9692.3, Par a, d, f; 9-692.4, Par. a.

APPENDIX 3—NEW MEXICO

CONFIDENTIALITY OF STUDENT RECORDS

These schools must make every effort to keep student records confidential and out of the hands of those who might use these for other than legitimate purposes. Information of a highly confidential and personal nature about students that counselors, teachers, and other school personnel acquire must be respected as confidential.

A. *Disclosure to the Student Himself*
1. A student has the right to inspect his academic record and is entitled to an explanation of any information recorded on it. This information is that specifically stated in Standard III, paragraph B, State Minimum Standards.

B. *Disclosure to Faculty and Administrative Officers of the Institution*
1. Faculty and administrative officers of the school who have a legitimate interest in the material and demonstrate a need to know should be permitted to look over the required records of any student.
2. The contents of the official folder of a student should not be sent outside the Office of the Registrar or other records office except in circumstances specifically authorized by the principal or the custodian of the other records. A permanent record card should never leave the Office of the Principal or other official since copies can readily be prepared.

C. *Disclosure to Parents, Educational Institutions and Agencies*
1. Transcripts or grade reports may be released to parents or guardians without prior approval from the student if enrolled in any school in New Mexico.
2. A request for a transcript or other academic information from another institution of learning indicating the reason therefore may be honored as a matter of inter-institutional courtesy. There is no need to secure prior approval from the student.

3. Requests from research organizations making statistical studies may be honored without prior approval of the student provided no information revealing the student's name is supplied.

D. *Disclosure to Government Agencies*

1. Properly identified representatives from federal, state, or local government agencies may be given the following information if expressly requested:
   a. Verification of date and place of birth;
   b. School or division of enrollment and class;
   c. Dates of enrollment;
   d. Home and local addresses and telephone numbers;
   e. Name and address of parent or guardian.
2. Concerning release of further information, it should be noted that government investigative agencies as such have no inherent legal right to access to student files and records. When additional information is requested, it should be released only on written authorization from the student. If such authorization is not given, the information should be released only on court order or subpoena. If a subpoena is served, the student whose record is being subpoenaed should be notified and that subpoena should be referred to the school's legal counsel.

E. *Disclosure to Other Individuals and Organizations*

Information furnished to other individuals and organizations should be limited to the items listed below under "Telephone Inquiries" unless the request is accompanied by an information or transcript release signed by the student.

F. *Disclosure in Response to Telephone Inquiries*

1. Extreme caution must be used when any information is released in response to telephone inquiries and should be limited to:
   a. Whether or not the student is currently enrolled;
   b. The school or division in which he is or was enrolled and his class;
   c. Dates of enrollment.
2. Release of addresses or telephone numbers should be consistent with school policy governing distribution of student directories.
3. Urgent requests for student information, e.g., address, telephone number, or immediate whereabouts, based upon an apparent emergency, should be handled by the principal, including reference to other appropriate officer or individual.

Approved by the State Board of Education
February 10, 1972

APPENDIX 4—NEW JERSEY

8:3-4 Inspection of School Records (Pursuant to N.J.S.A. 18A:36-19)

(a) Pupil records may, in the discretion of the board of education or any officer or employee of the board designated by the board to act for it, be open to inspection by authorized representatives of Selective Service System, Federal Bureau of Investigation, United States Army, and United States Navy; and, upon request of the

Selective Service System, Federal Bureau of Investigation, United States Army, and United States Navy, information relating to pupils and former pupils may be furnished for purposes of determining their fitness for induction into the armed services of the United States.

(b) Pupil records may be open to inspection by persons who, in the judgment of the board of education or any officer or employee of the board designated by the board, have a legitimate interest in the records for purposes of systematic educational research, guidance, and social service.

(c) Items of information contained in the records of a given pupil shall be made available, upon request, for inspection by a parent, guardian or other person having custody and control of the child, or authorized representative of the same; provided, that after the pupil has attained the age of twenty-one years, the items of information shall be made available for inspection by the pupil or his authorized representative, and not to the parent or guardian.

(d) Items of information contained in the records of a given pupil may be furnished upon request to employers and to institutions of the same or higher grade for purposes of employment and admission to educational institutions.

(e) Nothing in these rules and regulations contained shall be construed to prohibit the board of education, or any office or employee of the board designated by the board, to withhold items of information which, in the judgment of the said board, or its designated officer or employee, are of a confidential nature or in which the applicant for such information has no legitimate interest.

APPENDIX 5—NEW HAMPSHIRE

4350:1 *Student Records.*

Transcripts of academic records shall contain only information about academic status. Disciplinary records and counseling files should be kept separate and made available only to authorized persons on campus or to persons off campus when the consent of the student has been obtained except under legal compulsion or in cases where the safety of persons or property is involved. No records should be kept which reflect the political activities or beliefs of students. Institute directors shall make arrangements for the destruction of non-current disciplinary records. Administrative staff and faculty members shall respect confidential information about students acquired in the course of work.

APPENDIX 6—OREGON

SENATE BILL 160

AN ACT

Relating to disclosing of student communications by school teachers and employees; creating new provisions; and amending ORS 44.040.

Be It Enacted by the People of the State of Oregon:

Section 1. For purposes of this Act, the following definitions will apply:
(1) "Student records" include all records relating to students maintained by an elementary or secondary school.
(2) "Student behavioral records" are student records which include psychological tests, personality evaluations, records of conversations and any written transcript of incidents relating specifically to student behavior.
(3) "Student progress records" are student records which include transcripts of grades and courses taken, records of attendance, tests relating specifically to achievement or measurement of ability, and records of health.
(4) "Superintendent" means the highest ranking administrative officer in a school district or an educational institution, or in his absence, the person designated to fulfill his functions.
(5) "Board" means the board of directors of a school district or other educational institution.

Section 2. (1) All student records maintained by a school or educational institution shall be confidential, and except as hereinafter provided shall be open for inspection only in accordance with such rules and regulations as the board shall adopt.
(2) The board shall establish rules and regulations to provide that all student records maintained by any elementary or secondary school in their district shall be available for inspection by any parent or legal guardian requesting to see such records; however, student behavioral records shall be released only in the presence of an individual qualified to explain or interpret the records.
(3) Release of student behavioral records for use in any proceedings, civil or criminal, in any court of this state shall be made only by the superintendent or his designated representative, or with the consent of the student or juvenile so confiding or to whom such records relate, if the student is 21 years of age or over, or if the person is a minor, with the consent of his parent or legal guardian. Release shall be made only in the presence of an individual qualified to explain or interpret the records.
(4) Student progress records shall be available to all teaching staff, to parents or legal guardians, and upon request, to other agencies having a demonstrated interest in the student.

Section 3. Any school or educational institution may transfer without penalty to any other school or educational institution all student records relating to a particular individual provided that they have received notice of the student enrolling in said institution.

Section 4. ORS 44.040 is amended to read:
44.040. (1) There are particular relations in which it is the policy of the law to encourage confidence, and to preserve it inviolate; therefore a person cannot be examined as a witness in the following cases:
(a) A husband shall not be examined for or against his wife without her consent, or a wife for or against her husband without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage. The exception does not apply to a civil action, suit or proceeding, by

one against the other, or to a criminal action or proceeding for a crime committed by one against the other.

(b) An attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon, in the course of professional employment.

(c) A priest or clergyman shall not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

(d) A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action, suit or proceeding, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.

(e) A public officer shall not be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure.

(f) A stenographer shall not, without the consent of his or her employer, be examined as to any communication or dictation made by the employer to him or her in the course of professional employment.

(g) A licensed professional nurse shall not, without the consent of a patient who was cared for by such nurse, be examined in a civil action, suit or proceeding, as to any information acquired in caring for the patient, which was necessary to enable the nurse to care for the patient.

(h) A certified psychologist, as defined in ORS 675.010, shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon, in the course of his professional employment.

(i) A certificated staff member of an elementary or secondary school shall not be examined in any civil action, suit or proceeding, as to any conversation between the certificated staff member and a student which relates to the personal affairs of the student or his family, and which if disclosed would tend to damage or incriminate the student or his family. Any violation of the privilege provided by this section may result in the suspension of certification of the professional staff member as provided in ORS 342.175 to 342.185.

(2) If a party to the action, suit or proceeding offers himself as a witness, it is deemed a consent to the examination also of a wife husband, attorney, clergyman, physician or surgeon, stenographer, licensed professional nurse, [*or*] certified psychologist or certificated staff member on the same subject.

Section 5. Any category of student records specifically designated as confidential pursuant to section 2 of this Act shall not be deemed a public record for the purposes of ORS 192.005.

APPENDIX 7—MINNESOTA

CHAPTER 11:21.00 GUIDE FOR FORMULATION OF LOCAL SCHOOL BOARD POLICY ON RELEASE OF INDIVIDUAL PUPIL INFORMATION

21.1 GENERAL STATEMENT

School records should be considered confidential and made accessible only to authorized persons. Before any pupil record is given or shown to any

person other than professional staff members of the school in which he is enrolled, the local school board should adopt a policy on release of pupil information. The policy should be such that it will provide for meeting local conditions in the school or community. The following guide has been prepared to assist the local school board in the formulation of a local policy.

21.2 POLICY GUIDE

21.21 For the purpose of this suggested policy, the pupil records are defined as follows:

a. *Permanent Records* are those records or parts of records which refer to factual information such as academic achievement, school attendance, participation in school activities, and vital statistics. The PERMANENT RECORD CARD presently in general usage contains information that should not be indiscriminately released. If the card is duplicated for use of authorized persons outside the school system, it is recommended that the following be deleted by masking before duplication:

(1) All reference to church, marital status of parents, and language spoken in the home. Any reference to race, color, social position or nationality must be deleted. (M.S. 127.08)

(2) The "Staff Evaluations-Personality Traits" rating scale. This scale, if used, should be contained only in the Cumulative Record folder.

(3) The "Standardized Test Record." This type of information should be released only with interpretation by appropriate professional personnel.

b. *Cumulative Records* are those records or parts of records which, in addition to the above, include such information as personal information, family background, character and ability, interview reports, anecdotal notes, disciplinary records, and test results. These records are primarily for internal use by the members of the professional staff in promoting the welfare of the students.

NOTE: "No district shall classify its pupils with reference to race, color, social position, or nationality . . . " (M.S. 127.08)

There is considerable difference in opinion as to how much derogatory information should be included in the cumulative record folder when a pupil transfers to another school. There is a danger that the child's new teacher will be prejudiced against the pupil by the negative comments of a preceding teacher. As teachers develop increasingly professional attitudes, the danger of such negative effects becomes less and less.

Before a cumulative record folder is sent to another school, one or more school staff members who know the pupil best should review the contents of the folder to assure themselves the record is the most accurate picture that can be given of the individual in the light of their experience with him. Unless this reviewing is done, a certain amount of biased and irrelevant information may be accumulated perhaps to the detriment of the pupil's welfare. Also, if this practice is made standard, the teachers receiving the information will feel more secure in depending on this record than they otherwise may.

21.22 *Permanent Records.* Factual information taken from the Permanent Records may be released by the superintendent, principal, or guidance counselor, in the following cases:

(1) Upon the request of parent or guardian for his personal use or for the use of others.

(2) Upon the request of the pupil having reached majority.

(3) Upon the request of a bona-fide institution of higher learning.

(4) Upon the request of a prospective employer. Individual pupil information other than factual should ordinarily not be released to prospective employers as a result of a telephone request.

(5) Or as authorized by the superintendent when requested by the proper government officials.

(6) Or as evidence to support a scholarship application.

21.23 *Cumulative Records.* Are primarily for the use of the teachers, counselors and school administrators and information therein should be released only when interpreted by a properly qualified staff member in response to the following types of requests:

(1) Upon the request of the parent or guardian for his personal use or the use of others.

(2) Upon the request of the pupil having reached majority.

(3) Or as authorized by the superintendent when it is clear that information from the records will be for the welfare of the student.

21.24 *Other Uses*

a. The policy suggested above does not preclude the use of pupil records for research purposes when the anonymity of the individual is maintained and when the release is authorized by proper school authority and when the welfare of the pupil is not adversely affected.

b. This suggested policy will not prohibit a principal, counselor, or teacher from giving personal recommendations on request of the pupil or his parents for use in obtaining employment or gaining admission to an institution of higher learning.

21.25 Protection of the Pupil Against Discrimination in Employment Practices.

For assistance in following both the letter and the spirit of laws against discrimination, refer to the pamphlet entitled "Pre-Employment Inquiry Guide," published by the State Commission Against Discrimination, 55 State Office Building, St. Paul, Minnesota 55101. If the copy sent to the school has been lost, additional copies may be obtained from the Commission. For the text of the law, refer to M.S. 363.03 Subd. 1, Item 8, or to the "Guide."

ANNOUNCING A NEW SERIES

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